



Responsiveness Summary
for
Public Comments Received
on the

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

SPDES PERMIT
FOR STORMWATER DISCHARGES

from

MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)

of

NEW YORK CITY

SPDES # NY0287890
DEC ID # 2-6500-00058/00001

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

**Responsiveness Summary
NYC MS4 SPDES Permit
NY0287890**

I. INTRODUCTION

On July 15, 2022, the New York State Department of Environmental Conservation (NYSDEC or Department) issued a final State Pollutant Discharge Elimination System (SPDES) permit to the New York City Department of Environmental Protection (NYCDEP or Permittee) for its Municipal Separate Storm Sewer System (MS4), permit ID # NY0287890, with an effective date of August 1, 2022. On January 31, 2020, NYCDEP applied for the renewal and modification of MS4 SPDES permit NY0287890.

On January 3, 2022, NYSDEC issued NYCDEP a Notice of Complete Application (NOCA) for the renewal and modification of NY0287890. On January 5, 2022, NYSDEC published the NOCA in the Environmental Notice Bulletin (ENB), which included a link to the draft permit and fact sheet, for public review and comment. On January 7, 2022, NYCDEP published the NOCA in the *New York Daily News* opening the thirty (30) day comment period. On February 2, 2022, and in response to public comments received on the record, NYSDEC extended the public comment period through March 4, 2022.

NYSDEC received two public comment letters from:

	Organization	Name	Date
1	Riverkeeper	Michael Dulong	March 4, 2022
2	NYCDEP	Pinar Balci, Assistant Commissioner	February 28, 2022

As required by 6 NYCRR 621.10(e), NYSDEC prepared this Responsiveness Summary to address relevant comments received during the public comment period. This Responsiveness Summary identifies any conditions in the final permit and fact sheet that are different from the conditions in the draft permit and fact sheet and the reasons for the changes.

NYSDEC organized comments made on the draft permit and fact sheet, and NYSDEC's responses, by commenter and then to follow the format of the final permit. Unless otherwise noted, the comments are direct quotations. The full text of all comments received are included in the Appendix of this Responsiveness Summary.

I. RIVERKEEPER COMMENTS AND RESPONSES

PART II. SPECIAL CONDITIONS

PART II.B – IMPAIRED WATERS

Comment 1: We urge NYSDEC to extend the no-net increase analysis for all pollutants and all waterbodies impacted by construction sites. A no-net increase analysis should be required for all construction projects, and NYCDEP should use the most stringent analysis for each, akin to the Nitrogen no-net increase calculator. NYCDEP should also model for net-zero increase of stormwater and sewage flows, rather than modeling only for net increase of pollutants of concern.

It is only by conducting a more thorough analysis for each construction project that NYCDEP can understand how a waterbody will truly be impacted and employ the proper mitigation measures to ensure a net zero effect on stormwater outfalls. As we can expect stormwater pollution to increase significantly with climate change, the no-net increase analysis is prudent and will help set a baseline for pollution to understand the impacts of increased precipitation.

Response 1: *No changes have been made in response to this comment. This permit does not apply to sewage flows, nor does it regulate the volume of treated stormwater discharges and those issues are therefore beyond the scope of this permitting action.*

The purpose of the MS4 permit is to implement upstream controls that facilitate removal of pollutants of concern prior to discharge. Therefore, increases in stormwater will not affect the discharge of pollutants of concern because those pollutants are controlled prior to entering the stormwater sewershed. The Department also notes that NYSDEC's Construction General Permit (CGP) and NYCDEP's Unified Stormwater Rule (USWR), which applies to more sites than the CGP, regulate pollutants generated across New York City. Both NYSDEC's CGP and NYCDEP's USWR reduce up to forty (40) percent of Nitrogen and Phosphorus, and up to eighty (80) percent of total suspended solids (TSS) from stormwater discharges from construction sites that qualify as covered development projects.

In addition, waterbodies that are not impaired have an assimilative capacity to accept and dissipate pollutants discharged to it, while impaired waterbodies have a lesser ability to assimilate pollutants discharged to them, even at reduced concentrations, thereby exacerbating the impairment. As a result, the Department has added additional controls for discharges of pollutants of concern into impaired waterbodies. Part II.B.1.b of the final permit requires that a developer preparing a SWPPP show no net increase of pollutants of concern as discharged from the site into an impaired waterbody. NYCDEP's MS4 inspection program also supports the anticipated reduction in pollutants of concern.

Although the Department acknowledges the effects of climate change include increases in total precipitation volume and intensity, the Department notes that the purpose of the MS4 permit is to implement upstream controls that facilitate removal of pollutants of concern prior to discharge. Therefore, increases in stormwater will not affect the discharge of pollutants of concern because those pollutants are controlled prior to entering the stormwater sewershed.

Finally, the Department notes that NYCDEP noticed the USWR (Chapter 19.1 of Title 15 of the Rules of the City of New York), including the New York City Stormwater Manual (an appendix to Chapter 19.1 of Title 15 of the Rules of the City of New York), for public comment on December 10, 2021, held a public hearing on January 10, 2022, and enacted the USWR on and with an effective date of February 15, 2022. NYCDEP conducted extensive outreach to stakeholders on the rule and did not receive any substantive comments on the record that necessitated changes to either the USWR or the New York City Stormwater Manual.

PART II.B.2 - IMPAIRED WATERS WITH APPROVED COMBINED SEWER OVERFLOW LONG TERM CONTROL PLANS (CSO LTCPs)

Comment 2: It is crucial that DEC properly define Priority MS4 Waterbodies to include all waters impaired by urban stormwater runoff, not just Coney Island Creek, so that NYCDEP will continue to be required to implement site specific best management practices and evaluate the relevant sewersheds for green infrastructure opportunities for those waters. To relax the definition of Priority MS4 Waterbodies in a renewed permit would be to backslide on an important provision of the permit, in violation of Clean Water Act (CWA) section 402(o).

DEC now proposes to explicitly limit the provision to apply to only Coney Island Creek. Draft MS4 Permit Provision II.B.2.a. states: “[t]he waterbody meeting these criteria at the time of [Effective Date of Permit] EDP is Coney Island Creek.” This sentence in the permit is in clear contradiction to the terms of the LTCPs agreed to between NYSDEC and NYCDEP. Moreover, by explicitly curtailing the definition of “Priority MS4 Waterbody” to include only Coney Island Creek, NYSDEC would allow NYCDEP to forego important effluent limitations in the previous permit, in violation of the anti-backsliding provisions of the CWA and Environmental Conservation Law (“ECL”).

Therefore, we urge NYSDEC not to limit the definition of Priority MS4 Waterbodies and require NYCDEP to fulfill the additional evaluations and best management practice implementation requirements for all waters in New York for which NYSDEC has determined urban runoff has made attainment of water quality standards impossible.

Response 2: *No changes have been made in response to this comment. Priority MS4 Waterbodies are defined in the State Pollutant Discharge Elimination System (SPDES) Permit number NY0287890 issued under this*

permitting action (final permit) as follows and are consistent with Part II.B.2 of the previously iteration of SPDES Permit number NY0287890 as issued in 2015 (2015 permit):

- 1. The Waterbody is listed in an approved Long Term Control Plan (LTCP);*
- 2. The LTCP does not project attainment of applicable water quality standards; and*
- 3. Discharges from the MS4 are considered a significant contributor to the impairment.*

Specifically, Part II.B.2 of the final permit requires that “New York City shall implement additional or customized stormwater control measures specific to that waterbody... The waterbody meeting these criteria at the time of the Effective Date of Permit (EDP) is Coney Island Creek.” This language is as stringent as the language in the 2015 permit, which was “waterbody with an approved CSO LTCP that does not predict compliance with applicable water quality standards, and where stormwater pollution from the Permittee’s MS4 is expected to be a significant contributor to the impairment identified in the CSO LTCP.” The only difference is that the language now specifically mentions Coney Island Creek, which is currently the only waterbody that meets the above criteria and was designated as such under the 2015 permit.

The Department is currently reviewing the final two LTCPs and, upon approval of the LCTPs, will designate any waterbodies as Priority MS4 Waterbodies that meet these criteria.

PART IV – STORMWATER MANAGEMENT PROGRAM (SWMP) REQUIREMENTS

PART IV.D - ILLICIT DISCHARGE DETECTION & ELIMINATION (IDDE)

Comment 3: We request that NYSDEC require the surveying of each outfall more often than once every ten years. Such a schedule is plainly insufficient. First, the permit term is only five years, so it is possible that NYCDEP *could entirely avoid* surveying some or even all of its outfalls within the next decade. Second, Riverkeeper’s routine patrols—multiple times per year—often identify dry weather discharges from outfalls, as well as other problems.

According to NYCDEP, in 2019 only six percent (6%) of outfalls were inventoried, compared to the rough *goal* of ten percent (10%). In 2020, NYCDEP inventoried only four percent (4%) of outfalls. At this rate, of course, New York City will not meet the goals of the Shoreline Survey to evaluate one hundred percent (100%) of outfalls. We urge NYSDEC to set at least a minimum annual inventory milestone, such as seven percent (7%), with credit given for outperforming the goal in previous years, so that NYCDEP is not allowed to fall far off track. Such milestones should remain enforceable by NYSDEC throughout the duration of the permit.

In addition, as part of its surveys, Riverkeeper requests that NYCDEP also be required to identify the elevation of all outfalls and assess their vulnerability to storm surge and sea level rise. Such additional information garnered while NYCDEP is on site could serve to inform future MS4 upgrades and shoreline adaptation measures.”

Response 3: *No changes have been made in response to this comment. As stated in the Responsiveness Summary for NYCDEP’s fourteen (14) wastewater recovery facilities issued on June 8, 2022, the WRRF permits require NYCDEP to conduct an assessment of all outfalls along the shoreline, including those it does not own. However, this assessment is done from a boat and not from walking along the shorelines. For non-NYCDEP outfalls, inquiries are sent to the property owner requesting outfall structure and discharge information. NYCDEP maintains records of its sewer systems, including outfall elevations, and considers sea level rise in all new infrastructure projects. The WRRF permits requires that NYC-owned CSO outfalls and structures be cleaned and maintained regularly so as to maximize the collection system for storage. NYCDEP must keep signage up to date in accordance with CSO Best Management Practice (BMP) No. 13 and 6 NYCRR 750-1.12, including both content and presence of the sign at the outfall structure.*

PART IV.F - POST CONSTRUCTION STORMWATER MANAGEMENT

Comment 4: NYSDEC must set the threshold for post construction stormwater controls in the Draft MS4 Permit no less stringent than 15,000 square feet.

Response 4: *No changes have been made in response to this comment. As required by Part IV.F.4 of the 2015 permit, the Permittee conducted a Lot Size Soil Disturbance Threshold Study for Construction and Post-Construction. The study recommended a soil disturbance threshold of 15,000 to 25,000 square feet, but also concluded that the cost-to-benefit ratio increased for a lower threshold (e.g., 20,000 square feet) because it would cover mostly single- and two-family housing. Therefore, the proportion of cost of administering permit coverage to these small lots is too great in comparison for the water quality benefits. NYCDEP has since promulgated the USWR that has incorporated this 20,000 square foot threshold and that underwent appropriate public review. See response to Comment 1.*

Comment 5: Despite being listed as “covered development projects” that are subject to controls for a disturbance greater than 20,000 square feet, the updated *New York City Stormwater Manual* excludes right of way projects unless they are greater than one acre. The permit mirrors this exemption at section IV.F.4.

According to NYCDEP, the public right of way “constitutes approximately 30% of the impervious city (*sic*) and generates significant stormwater runoff during rain events.”

This area creates a tremendous volume of polluted stormwater runoff and therefore represents an important opportunity to reshape New York City's stormwater practices. Such stormwater controls are especially important at street ends abutting waterways, where the typically low-lying street ends could be used as "sponges" to retain, detain and treat polluted stormwater. Therefore, we urge NYSDEC to delete this exemption and adopt the 20,000 square foot threshold for right-of-way soil disturbance.

NYSDEC has not provided any explanation for this very particular carve-out. There does not seem to be any reason why the stormwater management burden for public right-of-way projects is different from that of private development projects. If NYSDEC does conclude there is such a difference, we request that NYSDEC detail its reasoning. We note that this exemption would not and should not apply to right-of-way soil disturbance in sewersheds that drain to impaired waters. To the extent that *any* such projects without post-construction stormwater controls contribute to water quality standards violations, they must be clearly and unequivocally prohibited in the permit.

Response 5: *No changes have been made in response to this comment. The New York City Stormwater Manual is an appendix to the USWR and was noticed pursuant to New York City's public notice requirements. See response to Comment 1. As a result, the commenter has had an opportunity to raise any substantive issues with NYCDEP's New York City Stormwater Manual during the public comment process.*

The Department has recognized that construction in the right of way does not add impervious surface and is often much more temporary than traditional lot development that the construction threshold targets. NYCDEP has demonstrated that fitting post-construction SMPs in the subsurface congested with sewers, electric cable, gas pipes and even transit infrastructure that is often placed in the right of way will be inhibitive to construction timeline and cost reduction. NYCDEP determined that these negative consequences were too great and outweighed the benefits of implementation of increased stormwater management practices within the urbanized area. The Department has reviewed NYCDEP's analysis and concurs with its finding. In addition, the Department notes that this requirement for New York City is more stringent than the CGP. Construction in the right of way is still regulated by the one (1) acre threshold of the CGP, which is protective of water quality from pollutants of concern associated with construction activities.

Comment 6: We appreciate that the new USWR also sets a separate threshold of 5,000 square feet of new impervious surface. Section 19.1-01.2 of Title 15 of the rules of New York defines 'covered development project' to include 'soil disturbance greater than or equal to 20,000 square feet or creation of 5,000 square feet or more of impervious surface.' The Draft MS4 Permit does not seem to incorporate the new impervious surface threshold. This additional threshold is clearly achievable by the permittee and should be added as a requirement of the permit.

That said, it is the case in New York City that most development will in fact be redevelopment and unlikely to create more than 5,000 square feet of new impervious surface. The development of hundreds of properties of less than 20,000 square feet without sufficient stormwater controls will have a cumulative adverse impact on New York City's sewer system and waterways. Therefore, regardless of an impervious surface threshold, it is crucial that the soil disturbance threshold for all projects, including projects in the public right-of-way, be set at 15,000 square feet."

Response 6: *Changes have been made in response to this comment. In Parts IV.E and IV.F of the final permit, the Department has added the 5,000 square-foot threshold for new impervious surface that was adopted by the Permittee on February 15, 2022, as part of the USWR. The change is incorporated as part of the definition of "covered development project," which is the type of development activity that is targeted by the Permit.*

PART IV.H – INDUSTRIAL & COMMERCIAL STORMWATER SOURCES

Comment 7: Riverkeeper applauds NYCDEP for assessing eight hundred seventy-three (873) unpermitted industrial facilities in 2020, up from seventy-nine (79) the prior year. Of these, only three hundred seventy-three (373) facilities were still in operation, and eighty-eight (88) were referred to NYSDEC for further assessment. We encourage NYSDEC to take strong enforcement action on these facilities and bring them into compliance with the CWA. Over the years, Riverkeeper has identified dozens of similar sites and has filed citizen suits, a much less efficient way to bring about the same result NYSDEC could achieve by inspecting sites and sending Notices of Violations when appropriate. NYSDEC enforcement actions should be reported by NYCDEP and shared with the public as part of the annual SWMP report."

Response 7: *No changes have been made in response to this comment. Enforcement by the Department is outside the scope of the final permit. Pursuant to Part IV.H.3 of the permit, the Permittee is required to inspect industrial and commercial facilities and assess the applicability of the Multi-Sector General Permit, and then refer those facilities to the Department. Pursuant to Part IV.M.4.h of the permit, NYCDEP's annual report must contain the number of facilities it refers.*

II. NYCDEP COMMENTS AND RESPONSES

PART II – SPECIAL CONDITIONS PART II.B.1.B.

Comment 1: Current text: “For non-negligible changes (i.e., land disturbances greater than or equal to one acre where there is an increase in impervious cover)² in land use within the MS4 area draining to impaired waters, the Permittee shall continue to incorporate a pollutant load... Footnote 2 – The threshold for non-negligible land use changes that necessitates a provision of no net increase of pollutants to impaired waters will change from one acre to 20,000 square feet in June 2022, as according to the schedule outlined in Table 2 of Part IV.O. of this Permit.”

The threshold changed as of February 15, 2022. Footnote 2 should be deleted and the sentence previously containing Footnote 2 be revised to: “For non-negligible changes (i.e., land disturbances greater than or equal to 20,000 square feet where there is an increase in impervious cover) 2 in land use within the MS4 area draining to impaired waters, the Permittee shall continue to incorporate a pollutant load...”

Response 1: *Changes have been made in response to this comment. The Department deleted Footnote two and amended the text as follows:*

“For non-negligible changes (i.e., land disturbances greater than or equal to 20,000 square feet where there is an increase in impervious cover) in land use within the MS4 area draining to impaired waters, the Permittee shall continue to incorporate a pollutant load...”

PART III – LEGAL AUTHORITY AND STORMWATER PROGRAM ADMINISTRATION

PART III.C.1.B

Comment 2: Current text: “Written Notices – Written notices of violation (NOVs) must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.”

NYC regulations now refer to “summonses” rather than “notices of violation or NOVs.”

Response 2: *Changes have been made in response to this comment. The Department amended the text as follows:*

“Written notices – written summonses must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.”

PART IV – STORMWATER MANAGEMENT PROGRAM (SWMP) REQUIREMENTS

PART IV.D.1

Comment 3: Current text: “Within six months of EDP, the Permittee shall develop an IDDE Plan in accordance with the “Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments” ... and provide it to the Department for its review and approval.”

Not included in Table 2: Deliverables

Response 3: *Changes have been made in response to this comment. The Department added the following deliverable to Table 2:*

“Development of an IDDE Plan in accordance with the “Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments” (Center for Watershed Protection and Robert Pitt, October 2004) for Department review and approval. (Part IV.D.1).” Schedule: “Six months from EDP.”

PART IV.D.2

Comment 4: Current text: At EDP and annually thereafter, the Permittee will provide an updated list of IDDE points of contact for each agency.

Not included in Table 2: Deliverables.

Response 4: *Changes have been made in response to this comment. The Department added the following deliverable to Table 2:*

“Updated list of IDDE points of contact for each agency.” Schedule: “At EDP and annually thereafter.”

PART IV.E

Comment 5: Current text: “This part (Part IV.E) applies to runoff to the Permittee’s MS4 from covered development projects, construction activities that result in a land disturbance of greater than or equal to one acre,⁷ or construction activity disturbing less than one acre if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The threshold value for land disturbance will change from one acre to 20,000 square feet and shall be implemented in accordance with the schedule included in Part IV.O Table 2.

⁷ “The threshold value for land disturbance that activates the Permittee’s approved program will change from one acre to 20,000 square feet on February 16, 2022, as stated in Table 2 of Part IV.O. of this Permit.”

Threshold changed as of 2/15/22.

Response 5: Changes have been made in response to this comment. The Department deleted references to the threshold of one acre and all references to future lowering of the threshold.

The Department deleted Footnote 7 and amended the text as follows:

“This part (Part IV.E) applies to runoff to the Permittee’s MS4 from covered development projects, construction activities that result in a land disturbance of greater than or equal to 20,000 square feet or construction activity disturbing less than 20,000 square feet if the construction activity is part of a larger common plan of development or sale that would disturb 20,000 square feet or more.”

PART IV.F

Comment 6: Current text: “This part (Part IV.F) applies to covered development projects, construction activities that result in a land disturbance of greater than or equal to one acre, or construction activity disturbing less than one acre if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The threshold value for land disturbance will change from one acre to 20,000 square feet and shall be implemented in accordance with the schedule included in Part IV.O Table 2.”

Threshold changed as of 2/15/22.

Response 6: Changes have been made in response to this comment. The Department deleted references to the threshold of one acre and all references to future lowering of the threshold.

The Department amended the text as follows:

“This part (Part IV.F) applies to covered development projects, construction activities that result in a land disturbance of greater than or equal to 20,000 square feet, or construction activity disturbing less than 20,000 square feet if the construction activity is part of a larger common plan of development or sale that would disturb 20,000 square feet or more.”

PART IV.F.1.F.IV

Comment 7: Current text: “Practices installed by the Permittee (including any applicable projects pursuant to section IV.G.2) shall be approved per requirements in section (IV.E) and maintained in accordance with all requirements of sections IV.F.1.f.i-iii. and IV.G.”

Incorrect subsection cited.

Response 7: Changes have been made in response to this comment. The Department amended the Permit with the following citation:

“Practices installed by the Permittee (including any applicable projects pursuant to section IV.G.2) shall be approved per requirements in section (IV.E) and maintained in accordance with all requirements of sections IV.F.1.g.i-iii. and IV.G.

PART IV.H.2.A

Comment 8: Current text: “Implement the plan to assess industrial and commercial facilities not covered under the SPDES [Multi Sector General Permit] MSGP

- i. Complete assessments of original inventory of approximately 1,250 unpermitted facilities within one year from EDP.
- ii. Continue to assess and report in the Annual Report on any newly identified, unpermitted industrial and commercial facilities.”

Assessments of original inventory has been completed.

Response 8: Changes have been made in response to this comment. The Department amended the text as follows:

“Implement the plan to assess industrial and commercial facilities not covered under the SPDES MSGP by continuing to assess and report in the Annual Report any newly identified, unpermitted industrial and commercial facilities.”

PART IV.I.1

Comment 9: Current text: “Commence, by March 14, 2021, a study to determine loading rate of floatable and settleable trash and debris from the MS4 to waterbodies impaired for floatables....”

DEP has already commenced the [loading rate] study (under the 2015 permit). So, the requirement is not necessary.

Response 9: Changes have been made in response to this comment in accordance with the new schedule. The Department amended the text as follows:

“Complete within 3 years from EDP, a study to determine the loading rate of floatable and settleable trash and debris from the MS4 to waterbodies listed as impaired for floatables in the MS4 areas, using the workplan approved by the Department.

PART IV.M

Comment 10: Current text: “The Permittee shall maintain the Consolidated Information Tracking System to track the information required in the permit as well as the information that the Permittee must report in the annual report. “

Add that any new metrics required by renewal permit will be incorporated in Consolidated Information Tracking System (CITS) within 1 year of EDP and will be reflected in the next annual report after that update to CITS.

Response 10: *Changes have been made in response to this comment. The Department amended the text as follows:*

“The Permittee shall maintain the Consolidated Information Tracking System to track the information required in the permit as well as the information that the Permittee must report in the annual report. Within a year of EDP, Permittee shall update CITS to include the new metrics listed below and will include those new metrics in the next annual report following those updates.”

PART IV.O TABLE 2

Comment 11: Current text: “Deliverable II.B: Implementation of the new 20,000 square foot threshold for the no net increase (NNI) requirement for stormwater discharges to impaired waters without a TMDL – due June 2022”

Threshold lowered to 20,000 square feet as of February 15, 2022.

Response 11: *Changes have been made in response to this comment. The Department deleted references to the threshold of one acre and all references to future lowering of the threshold. The Department also deleted Deliverable II.B as NYCDEP has completed this deliverable.*

Comment 12: Current text: “Commence, by March 14, 2021, a study to determine loading rate of floatable and settleable trash and debris from the MS4 to waterbodies impaired for floatables....”

DEP has already commenced the [loading rate] study (under the 2015 permit). So, the requirement is not necessary.

Response 12: *Changes have been made in response to this comment in accordance with an approved schedule. The Department acknowledges this commencement. The Department amended Deliverable IV.I as follows:*

“Completion of loading rate study.” Schedule: “Within three years of EDP.”

PART VII APPENDIX 1

Comment 13: “Spring Creek and tribs is listed as impaired for “Garage & Refuse””

Typo in the Spring Creek and tribs impairment: listed as “Garage & Refuse.”

Response 13: *Changes have been made in response to this comment. The Department amended the typo of “Garage” to “Garbage” and the text now reads as follows:*

“Spring Creek and tribs is listed as impaired for ‘Garbage & Refuse’”

PART VII APPENDIX 2

Comment 14: “Reduce to 20,000 square feet the lot size, soil disturbance threshold for triggering the applicability of construction and post-construction stormwater management requirements at new development and redevelopment sites (per schedule in Part O)”

Threshold lowered to 20,000 square feet as of February 15, 2022.

Response 14: *Changes have been made in response to this comment. The Department deleted references to the threshold of one acre and all references to future lowering of the threshold. The Department deleted SWMP Requirement IV.F. Deliverable II.B 4 as NYCDEP has developed the SWMP.*

FACT SHEET

Comment 15: Pg. 3 third bullet current text: “The Permittee must provide a list of people at municipal agencies for whom to contact in the event of an illicit discharge.”

Add condition.

Response 15: *Changes have been made in response to this comment. The Department added the frequency requirement and amended the grammatical error in the Fact Sheet:*

“At EDP, the Permittee must provide a list of people at municipal agencies for the Department to contact in the event of an illicit discharge. That list must be updated annually.”

Comment 16: Pg. 3 fourth bullet current text: “The permit requires erosion and sediment controls at road construction projects that disturb less than an acre of land. 5th bullet – The Permittee must implement a new threshold of 20,000 square feet for covered development projects under construction and post-construction requirements. The threshold will also apply to maintenance projects in the right-of-way; however, those projects will not be subject to post construction requirements.”

Reorganize information for clarity.

Response 16: *Changes have been made in response to this comment. The Department reorganized the bullets under Summary of Permit Changes as follows:*

- *“The Permittee has implemented a new threshold of 20,000 square feet for covered development projects, including in the right of way, under construction and post-construction requirements. However, road reconstruction projects that disturb less than an acre of land will require erosion and sediment controls only;*
- *The 20,000 square-foot for covered development projects under construction and post-construction requirements will also apply to maintenance activities in the right of way, however, those projects will require erosion and sediment controls only...”*

Comment 17: Pg. 4 current text: “The Permittee is required to evaluate long term trends in the MS4 and to ultimately develop a model that can be used with the model developed by the City’s LTCP program.”

Water quality modeling effort as defined in MS4 permit.

Response 17: *Changes have been made in response to this comment to clarify what the types of analytic tools that this program is intended to produce. The Department amended the text of the Fact Sheet as follows:*

“The Permittee is required to evaluate long term trends in the MS4 and to ultimately develop urban stormwater quality models to estimate runoff volume and pollutant loads for individual source areas within a watershed.”

Comment 18: Pg. 5 current text: “must implement a program that ensures no net increase (NNI) of [Pollutants of Concern] POCs...”

Spell out first use of POCs in Fact Sheet.

Response 18: *Changes have been made in response to this comment. The Department amended the text of the Fact Sheet as follows:*

“Must implement a program that ensures no net increase (NNI) of pollutants of concern (POCs)...”

Comment 19: Pg. 5 current text: “The Permittee identified three priority MS4 waterbodies under the previous permit: Coney Island Creek, featured in the approved Coney Island Creek LTCP, which will be subject to the terms dictated in the draft renewal permit under Part II.B.2.a-b and e; and Bergen Basin.”

Reference to Thurston and Bergen Basins incorrect.

Response 19: *Changes have been made in response to this comment. The Department deleted the incorrect references in the Fact Sheet, which now reads:*

“The Permittee identified one priority MS4 waterbody under the previous permit: Coney Island Creek, featured in the approved Coney Island Creek LTCP, which will be subject to the terms dictated in the final permit under Part II.B.2.a-b, and e.”

Comment 20: Pg. 7: Mapping and Illicit Discharge Detection and Elimination (IDDE) sections: None of the other permit sections are combined – seems like an odd pairing.

Response 20: *Changes have been made in response to this comment. The Department separated the two sections of the Fact Sheet as follows:*

“Mapping – The permit requires that the Permittee provide a storm sewer system drainage area map, showing the location of Permittee-owned or -operated MS4 outfalls discharging to surface waters of the State. This map is to be updated within five years of EDP.

Illicit Discharge Detection and Elimination (IDDE) – The permit requires that the Permittee continue to implement and enforce an IDDE program. To the extent existing programs do not satisfy..., the Permittee is required to include appropriate modifications or additions in the SWMP Plan. This program must include the following:

- *A law ordinance, or other ...*
- *A plan to detect and eliminate...*
- *A plan to ensure staff...*
- *The education of public employees...*
- *A list of contacts...*
- *The determination of appropriate BMPs...*
- *An outfall reconnaissance inventory...*
- *A sentinel monitoring program...”*

Comment 21: Pg. 9 current text: “This new threshold will go into effect in February 2022, as stated in the Unified Stormwater Rule, enacted by the NYC Council on September 27, 2020. Until then, the land disturbance threshold will remain one acre.”

Reference to Unified Stormwater Rule (USWR) incorrect.

Response 21: *Changes have been made in response to this comment. The Department amended the text of the Fact Sheet as follows:*

“This new threshold went into effect on February 15, 2022, as stated in the Unified Stormwater Rule, promulgated by DEP pursuant to legislation enacted by the NYC Council on September 27, 2020 (Local Law 91 Of 2020).”

Comment 22: Pg. 9 current text: “The inventory, which will include... and were both permitted by the Permittee since June 1, 2019, and implemented and authorized by the Department between March 10, 2003.

Sentence is incomplete.

Response 22: *Changes have been made in response to this comment. The Department amended the text of the Fact Sheet as follows:*

“The inventory, which will include all relevant information, including location, must include practices within the urbanized area that discharge to the MS4 and were both permitted by the Permittee since June 1, 2019, and implemented and authorized by the Department between March 10, 2003, and June 1, 2019.”

Comment 23: Pg. 10 current text: “The Permittee must, under the draft renewal permit and pursuant to local law, reduce the lot size soil disturbance threshold for applicability of post-construction stormwater management practices to 20,000 square feet in accordance with the schedule in Table 2 (to be implemented in February 2022).”

Threshold lowered to 20,000 square feet as of 2/15/22.

Response 23: *Changes have been made in response to this comment. The Department amended the text of the Fact Sheet as follows:*

“The Permittee has, under the final permit and pursuant to local law, reduced the lot size soil disturbance threshold for applicability of post-construction stormwater management practices to 20,000 square feet implemented as of February 15, 2022.”

Comment 24: Pg. 10 current text under Pollution Prevention/Good Housekeeping for Municipal Operations:

- “Incorporates runoff reduction techniques and green infrastructure during planned municipal upgrades, if feasible and cost-effective;
- Implements retrofits, where determined to be feasible and cost-effective, during major maintenance or rehabilitation of flood management projects;
- Considers, when feasible, green infrastructure for planned municipal upgrades, including in the municipal right of way. Green infrastructure will be designed per specifications of the NYC Stormwater Manual...”

5th and 7th bullets re: municipal upgrades are repetitive. 6th bullet should be deleted as there are no such existing projects to maintain, rehabilitate or retrofit.

Response 24: Changes have been made in response to this comment. The Department agrees that the language is repetitive in the fifth and seventh bullets, and that the sixth bullet is obsolete. The Department deleted the sixth bullet, as well as consolidated the fifth and seventh bullets in the Fact Sheet as follows:

“Incorporates runoff reduction techniques and green infrastructure during planned municipal upgrades, including in the municipal right-of-way, if feasible and cost-effective. Green infrastructure will be designed per specifications of the NYC Stormwater Manual.”

Comment 25: Pg. 10-11 current text: “Pollution Prevention/Good Housekeeping for Municipal Operations – ... To meet this requirement, the Permittee must implement a plan that:...

Industrial Stormwater Sources – ... To meet this permit requirement, the Permittee will need to implement a program that:

Both sound like new rather than ongoing programs.

Response 25: Changes have been made in response to this comment. To clarify that these are ongoing programs, the Department amended Parts IV.G and IV.H of the Fact Sheet as follows:

“Pollution Prevention/Good Housekeeping for Municipal Operations – ... To meet this requirement, the Permittee must continue to implement a plan that:...

Industrial Stormwater Sources – ... To meet this permit requirement, the Permittee must continue to implement a program that:...”

Comment 26: Pg. 11, 6th bullet under Industrial Stormwater Sources current text: “Under the draft renewal permit, includes a plan to inspect and assess unpermitted industrial and commercial facilities that have the potential to generate significant contributions of POCs to impaired waters.”

Misleading language. The renewal permit requires inventory to include such facilities but does not require a plan to inspect and assess them.

Response 26: Changes have been made in response to this comment. The Department amended the Fact Sheet as follows:

“Includes a plan to inspect and assess unpermitted industrial and commercial facilities not covered under SPDES MSGP or individual SPDES permits to determine whether they should be referred to the Department for such coverage.”

Comment 27: Pg. 11-12 current text under Control of Floatable and Settleable Trash and Debris:

The 2015 MS4 Permit required City to:

- Evaluate our existing program
- Identify best available technologies
- Develop a methodology to determine load

These requirements were completed with submission of the SWMP (section 9.2, 9.3, and 9.4) and are not part of the new draft permit.

Fact Sheet should also reflect Permit revisions (section IV.I.1) noted above: DEP already commenced study and must complete study within 3 years of EDP.

Response 27: *Changes have been made in response to this comment. The Department amended the Fact Sheet as follows:*

“The permit requires the Permittee’s stormwater program to target and control floatable and settleable trash and debris. To meet this permit requirement, the Permittee will be required implement the approved methodology to determine baseline load of trash and debris. Under the final renewal permit, this is referred to as the loading rate study, and must be completed within three years of EDP.”

Comment 28: Pg. 12 current text: “The Permittee is required, under the draft renewal permit, to evaluate long-term trends in water quality to develop an urban stormwater quality model. The Permittee is required to report its progress to the Department on an annual basis.”

Evaluating long-term trends is a separate requirement. Added more context to clarify.

Response 28: *Changes have been made in response to this comment. The Fact Sheet now clearly states that reporting is a separate requirement from trend evaluation The Department amended the Fact Sheet as follows:*

“The Permittee is required, under the final permit, to evaluate long-term trends in water quality and to develop urban stormwater quality models. The Permittee is required to report its progress on the development of the models to the Department starting two years after EDP, and annually thereafter.”

Appendix
Comments Received



March 4, 2022

Via Email to Comment.NYCMS4Ren2022@dec.ny.gov

Caitlyn P. Nichols
New York State
Department of Environmental Conservation
Region 2 Headquarters
47-40 21st St.
Long Island City, NY 11101

**Re: Comments on the Draft SPDES Permit for New York City's MS4;
Permit No. NY0287890**

Dear Ms. Nichols:

Thank you for the opportunity to submit comments on the New York State Department of Environmental Conservation's ("DEC") draft a renewal of the State Pollutant Discharge Elimination System (SPDES) permit for polluted stormwater discharges from New York City Department of Environmental Protection's ("DEP") Municipal Separate Storm Sewer System (MS4), SPDES Permit No. NY0287890 (the "Draft MS4 Permit"), as noticed in the January 5, 2022 *Environmental Notice Bulletin*.

Riverkeeper is a non-for-profit watchdog organization dedicated to protecting and restoring the Hudson River from source to sea and safeguarding drinking water supplies, through advocacy rooted in community partnerships, science and law. It is Riverkeeper's goal to ensure New York City's waterways are restored to once again support fishing and swimming uses. Minimizing polluted stormwater discharges is crucial to improving the quality in the city's waters by limiting discharges of pathogens, nutrients, trash, floatables, toxics and oxidizable substances, among others.

Riverkeeper appreciates DEP's progress to implement the Stormwater Management Program ("SWMP") Plan under DEC oversight. The SWMP is continuing to make a measurable and significant impact to improve water quality throughout New York City. In particular, we appreciate that in 2022 the DEP has promulgated the Unified Stormwater Rule, a first step in strengthening the threshold for post-construction stormwater pollution prevention controls; and that in 2020 DEP visited 872 suspected industrial facilities to determine whether their operations

were operating in compliance with the Clean Water Act (“CWA”) and inspected 100 Stormwater Construction Permit Sites, among many other actions.

That said, we are concerned about deficiencies in the Draft MS4 Permit that will stymie progress on water quality improvement. In particular, we urge DEC to strengthen the permit by:

- Preserving the existing definition of Priority MS4 Waterbodies to include all waters in New York City that are impaired in part due to significant contributions of stormwater runoff from MS4 areas, rather than limiting the category to only Coney Island Creek;
- Strengthening the soil disturbance thresholds for post-construction stormwater pollution controls to the maximum extent practicable;
- Extending the no-net increase analysis requirements for all waters, not just impaired waters; and
- Increasing frequency and setting yearly minimum milestones for stormwater outfall surveying.

These comments are detailed further below.

I. Impaired Waterbodies/Priority Waters

It is crucial that DEC properly define Priority MS4 Waterbodies to include all waters impaired by urban stormwater runoff, not just Coney Island Creek, so that DEP will continue to be required to implement site specific best management practices and evaluate the relevant sewersheds for green infrastructure opportunities for those waters. To relax the definition of Priority MS4 Waterbodies in a renewed permit would be to backslide on an important provision of the permit, in violation of CWA section 402(o).

New York’s existing SPDES MS4 Permit defines “Priority MS4 Waterbodies” as “water bodies for which an approved CSO LTCP does not predict compliance with applicable water quality standards and where stormwater contributions from the Permittee’s MS4 are expected to be a significant contributory of the impairment identified in the CSO LTCP.”¹ The existing permit applies to the multiple waters with applicable Combined Sewer Overflow (“CSO”) Long Term Control Plans (“LTCPs”) agreed to between DEC and DEP, which indicate that not only will the LTCPs fail to cure the impairments even when implemented, but pathogens and floatables attributable to MS4 areas are a major cause of water quality impairment. For instance, the nominal Use Attainability Analysis (“UAA”) for Westchester Creek states: “Non-attainment of primary contact water quality criteria are attributable to the following UAA factors: Human caused conditions (direct drainage and urban runoff) create high bacteria levels that prevent the

¹ N.Y. State Dep’t of Env’tl. Conservation, State Pollutant Discharge Elimination System (SPDES) Permit for Municipal Separate Storm Sewer Systems of New York City, at § VI.B (2015), *available at* www.dec.ny.gov/docs/water_pdf/nycms4permit.pdf.

attainment of the use and that cannot be fully remedied for large storms.”² Similar language is applicable to the Hutchinson River³ and other waters.

Data from DEP indicates that not only are pathogens attributable to MS4 areas, trash pollution is a major cause of water quality impairment. Of the floatable trash collected by the DEP from its containment structures and open water areas, more than 90% is collected on the Bronx River.

For these “Priority MS4 Waters,” DEP is required to perform additional analyses required in sections II.2.a.ii to II.2.a.iv of the permit. These analyses include completing priority “source categorization” and a “description of the opportunities for implementing green infrastructure pilot projects and other structural retrofits . . . that are cost-effective and feasible. The provisions also require DEP to set “additional or customized non-structural BMPs” for each Priority Waterbody. DEP has not fulfilled its obligations under the existing permit.

DEC now proposes to explicitly limit the provision to apply to only Coney Island Creek. Draft MS4 Permit Provision II.B.2.a. States: “[t]he waterbody meeting these criteria at the time of EDP is Coney Island Creek.” This sentence in the permit is in clear contradiction to the terms of the LTCPs agreed to between DEC and DEP. Moreover, by explicitly curtailing the definition of “Priority MS4 Waterbody” to include only Coney Island Creek, DEC would allow DEP to forego important effluent limitations in the previous permit, in violation of the anti-backsliding provisions of the CWA and Environmental Conservation Law (“ECL”).

The ECL affords protection for New York’s water quality through its “anti-backsliding” provision, which stipulates, “when effluent limitations are established they must be at least as stringent as the effluent limitations previously required unless . . . an exception is warranted as provided” under section 402(o) of the CWA. ECL § 17-0809(3).

The terms of a MS4 permit constitute effluent limitations, since such terms impose restrictions on urban stormwater runoff pollution. Indeed, the ECL defines “effluent limitation” broadly to mean “any restriction on quantities, quality, rates and concentrations of chemical, physical, biological, and other constituents of effluents which are discharged into or allowed to run from an outlet or point source into waters of the state promulgated by the federal government.” ECL § 17-0105(15). To relax the definition of Priority MS4 Waterbodies so that DEP would no longer be obligated to implement site-specific non-structural best management practices or identify green infrastructure opportunities amounts to an impermissible regulatory “backslide.” ECL § 17-0809(3); see CWA § 402(o). Because the elimination of mandatory implementation of best management practices results in a less stringent “effluent limitation,” removing this requirement

² Keith W. Beckman, P.E., New York City Dep’t of Env’tl. Protection, Combined Sewer Overflow Long Term Control Plan for Westchester Creek, Appendix E: Supplemental Documentation at SD-91 (2015).

³ N.Y. City Dep’t Env’tl Protection, CSO Long Term Control Plan II; Public Meeting Response Summary Hutchinson River (Oct. 4, 2017).

can only be accomplished consistent with the limited exceptions to anti-backsliding outlined in section 402(o) of the CWA, none of which apply here. See ECL § 17-0809(3); CWA § 402(o)(2)(A)-(E), 33 USC § 1342(o)(2)(A)-(E). Moreover, in no case may a permit be modified to contain less stringent requirements if doing so would result in a violation of water quality standards. See CWA §§ 402(o)(1), 402(o)(2)(A)-(E), 402(o)(3); 33 USC §§ 1342(o)(1), 1342(o)(2)(A)-(E), 1342(o)(3). In this case, as the affected waters are already impaired for their designated uses, in significant part because of urbanized runoff, the permit provisions for Priority MS4 Waterbodies may not be relaxed. Therefore, we urge DEC not to limit the definition of Priority MS4 Waterbodies and require DEP to fulfill the additional evaluations and best management practice implementation requirements for all waters in New York for which DEC has determined urban runoff has made attainment of water quality standards impossible.

II. Post-Construction Stormwater Controls

We appreciate DEP's efforts to set a more stringent threshold for post-construction stormwater controls in the Draft MS4 Permit through the Unified Stormwater Rule. Of course, as environmental organizations have argued for years, the thresholds for controls (i.e. one acre for projects in the right-of-way and 20,000 square feet of soil disturbance for other projects) do not satisfy the "maximum extent practical" pollutant reduction requirement for post-construction stormwater controls.

- a. A more stringent soil disturbance threshold for post-construction stormwater controls is practicable and therefore required.

Under state and federal law, SPDES permits for MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable."⁴ Courts interpreting the phrase "maximum extent practicable" have found it to be clear and unambiguous: it means to the fullest degree technologically feasible, except where costs are wholly disproportionate to the potential benefits.⁵

As other cities have shown, and as DEP's own consultants have found, it is feasible and practicable to set much lower soil disturbance thresholds for post-construction stormwater controls. Almost all large cities impose stormwater control requirements on lots much smaller

⁴ 33 USC § 1342(p)(3)(B)(iii); ECL § 17-0808(3)(c); see also 40 CFR § 122.26(d)(2)(iv), 6 NYCRR § 750-1.11(a)(9) (requiring SPDES permits to comply with the enumerated federal regulations).

⁵ See, e.g., *Haeuser v. Dep't of Law, Gov't of Guam*, 97 F.3d 1152, 1159 (9th Cir. 1996) (finding that "practicable" means "capable of being done: feasible"); *Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990) (holding that, to meet the "practicable" standard, EPA must select the best level of technology unless costs are "wholly disproportionate" to benefits); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001) ("[T]he phrase 'to the maximum extent practicable' does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." (internal quotation omitted)); see also *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) (holding that "feasible" means physically possible).

than 20,000 square feet. Cities such as San Francisco, Washington, D.C., and Philadelphia, etc., have thresholds ranging from 5,000 to 15,000 square feet. DEP's own consultants have found that "[t]he approximate 'knee-of-the-curve' for acres v. permits is around 15,000 SF."⁶ Therefore, DEC must set the threshold for post construction stormwater controls in the Draft MS4 Permit no less stringent than 15,000 square feet.

b. DEC has not shown why a loophole for projects in the right-of-way is justified.

In the New York City Stormwater Manual, the DEP created a loophole for projects in the public right-of-way." While projects in the right-of-way are listed as "covered development projects" in the Unified Stormwater Rule, the updated *New York City Stormwater Manual* excludes right-of-way projects unless they are greater than one acre, in contrast to all other projects that are subject to such controls for a disturbance greater than 20,000 square feet.

The same exemption would be established in the Draft MS4 Permit at section IV.F.4, allowing right-of-way construction disturbing less than one acre of soil to avoid post construction sediment controls.

With respect to covered development projects for road construction or reconstruction that are less than one acre, and for maintenance activities in municipal rights of way such as milling and paving that can contribute to contravention of water quality standards, erosion and sediment controls will be required, but post-construction stormwater management practices will not.

The relaxed threshold for right-of-way projects eliminates opportunities for stormwater management on construction or reconstruction projects that would otherwise trigger the 20,000 square foot threshold post-construction stormwater control requirement.

According to DEP, the public right of way "constitutes approximately 30% of the impervious city and generates significant stormwater runoff during rain events."⁷ This area creates a tremendous volume of polluted stormwater runoff and therefore represents an important opportunity to reshape the city's stormwater practices. Such stormwater controls are especially important at street ends abutting waterways, where the typically low-lying street ends could be used as "sponges" to retain, detain and treat polluted stormwater. Therefore, we urge DEC to delete this exemption and adopt the 20,000 square foot threshold for right-of-way soil disturbance.

⁶ N.Y. City Dep't of Env'tl. Protection, Municipal Separate Storm Sewer System Management Program Updates at 24 (Dec. 13, 2016).

⁷ New York City Dep't of Env'tl. Protection, Urban Stormwater Management in New York City, (Sept. 24, 2021), <https://storymaps.arcgis.com/stories/d4ac0c596689444dac46c9c2f3354e5e>.

The DEC has not provided any explanation for this very particular carve-out. There does not seem to be any reason why the stormwater management burden for public right-of-way projects is different from that of private development projects. If DEC does conclude there is such a difference, we request that DEC detail its reasoning.

We note that this exemption would not and should not apply to right-of-way soil disturbance in sewersheds that drain to impaired waters. To the extent that *any* such projects without post-construction stormwater controls contribute to water quality standards violations, they must be clearly and unequivocally prohibited in the permit.⁸

- c. The 5,000 square foot threshold for new impervious surfaces should be adopted in the Draft MS4 Permit.

We appreciate that the new Unified Stormwater Rule also sets a separate threshold of 5,000 square feet of new impervious surface.⁹ Section 19.1-01.2 of Title 15 of the rules of New York defines “covered development project” to include “soil disturbance greater than or equal to 20,000 square feet or creation of 5,000 square feet or more of impervious surface.” The Draft MS4 Permit does not seem to incorporate the new impervious surface threshold. This additional threshold is clearly achievable by the permittee and should be added as a requirement of the permit.

That said, it is the case in New York City that most development will in fact be redevelopment and unlikely to create more than 5,000 square feet of new impervious surface. The development of hundreds of properties of less than 20,000 square feet without sufficient stormwater controls will have a cumulative adverse impact on the city’s sewer system and waterways. Therefore, regardless of an impervious surface threshold, it is crucial that the soil disturbance threshold for all projects, including projects in the public right-of-way, be set at 15,000 square feet.

III. No-Net Increase Requirements

We appreciate the provisions for “no-net increase” of pollutants of concern for all impaired waters in section II.B.1. We urge DEC to extend the no-net increase analysis for all pollutants and all waterbodies impacted by construction sites. A no-net increase analysis should be required for all construction projects, and DEP should use the most stringent analysis for each, akin to the Nitrogen no-net increase calculator.

⁸ SPDES permits must also include any further pollution control measures that are needed to ensure compliance with state water quality standards. ECL § 17-0811(5); 6 NYCRR § 750-1.11(a)(5)(i); 40 CFR §§ 122.4(d), 122.44(d); *see also* 40 CFR § 123.25(a)(1), (15).

⁹ Title 15 § 19.1-01.2 of the rules of New York defines “covered development project” to include “soil disturbance greater than or equal to 20,000 square feet or creation of 5,000 square feet or more of impervious surface.”

We recommend modeling for net-zero increase of stormwater and sewage flows, rather than modeling only for net increase of pollutants of concern. Within this type of model, developers assess the stormwater runoff and likely water-use flow rates under multiple projected rainfall conditions on-site and within the context of the MS4 and/or CSO sewershed. The developer would identify pre- and predicted post-construction flow rates, including residential wastewater. If the flow rate post-development is not net-zero, then appropriate mitigation measures must be implemented to address the gap.

The simplest way to assess no-increase and appropriate management methodology is through a no net-increase calculator akin to those used by other municipalities such as San Francisco Water Power and Sewer.¹⁰ The calculator assists developers and design professionals working on projects within the MS4 and combined sewersheds to comply with the stormwater management performance requirements to capture and treat all runoff prior to discharge. These sizing calculators utilize best management practices to identify the path towards no net increase of stormwater or CSOs.

It is only by conducting a more thorough analysis for each construction project that DEP can understand how a waterbody will truly be impacted, and employ the proper mitigation measures to ensure a net zero effect on stormwater outfalls. As we can expect stormwater pollution to increase significantly with climate change, the no-net increase analysis is prudent and will help set a baseline for pollution to understand the impacts of increased precipitation.

IV. Illicit Discharge Detection and Elimination

As Riverkeeper and partners discussed in our comment letter on the 14 draft Wastewater Resource Recovery Facility SPDES permits, we reiterate our request that DEC require the surveying of each outfall more often than once every ten years. Such a schedule is plainly insufficient. First, the permit term is only five years, so it is possible that DEP *could entirely avoid* surveying some or even all of its outfalls within the next decade. Second, Riverkeeper's routine patrols—multiple times per year—often identify dry weather discharges from outfalls, as well as other problems.

According to DEP, in 2019 only 6% of outfalls were inventoried, compared to the rough *goal* of 10%. In 2020, DEP inventoried only 4% of outfalls. At this rate, of course, the city will not meet the goals of the Shoreline Survey to evaluate 100% of outfalls. We urge DEC to set at least a minimum annual inventory milestone, such as 7%, with credit given for outperforming the goal

¹⁰ San Francisco Pub. Utilities Comm.; Urban Watershed Mgmt. Program, MS4 BMP Sizing Calculator, *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjHq4HQ432AhXfnnIEHc7SBOQOEnoECAUQAO&url=https%3A%2F%2Fsfpub.org%2Fvi%2Fsites%2Fdefault%2Ffiles%2Fconstruction-and-contracts%2Fdesign-guidelines%2FBMP_MS4-Sizer-v2_20160516.xlsm&usq=AOvVaw2FhyLphPzOcMOBKHBRtHW4.

in previous years, so that DEP is not allowed to fall far off track. Such milestones should remain enforceable by DEC throughout the duration of the permit.

In addition, as part of its surveys, Riverkeeper requests that DEP also be required to identify the elevation of all outfalls and assess their vulnerability to storm surge and sea level rise. Such additional information garnered while DEP is on site could serve to inform future MS4 upgrades and shoreline adaptation measures.

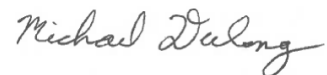
V. Industrial and Commercial Stormwater Sources

Riverkeeper applauds DEP for assessing 873 unpermitted industrial facilities in 2020, up from 79 the prior year. Of these, only 373 facilities were still in operation, and 88 were referred to DEC for further assessment. We encourage DEC to take strong enforcement action on these facilities and bring them into compliance with the CWA. Over the years, Riverkeeper has identified dozens of similar sites and has filed citizen suits, a much less efficient way to bring about the same result DEC could achieve by inspecting sites and sending Notices of Violations when appropriate. DEC enforcement actions should be reported by DEP and shared with the public as part of the annual SWMP report.

* * *

Thank you for your consideration of these comments. You can reach me at (914) 478-4501 or at mdulong@riverkeeper.org should you have any questions.

Respectfully submitted,



Michael Dulong
Senior Attorney

MS4 Permit + Fact Sheet – NYC Comments

Section/ Page	Current text	Issue	Revised text
MS4 Permit			
II.B.1.b	<p>For non-negligible changes (i.e., land disturbances greater than or equal to one acre where there is an increase in impervious cover)² in land use within the MS4 area draining to impaired waters, the Permittee shall continue to incorporate a pollutant load...</p> <p>Footnote 2 – The threshold for non-negligible land use changes that necessitates a provision of no net increase of pollutants to impaired waters will change from one acre to 20,000 square feet in June 2022, as according to the schedule outlined in Table 2 of Part IV.O. of this Permit.</p>	The threshold changed as of 2/15/22.	<p>For non-negligible changes (i.e., land disturbances greater than or equal to one are 20,000 square feet where there is an increase in impervious cover)² in land use within the MS4 area draining to impaired waters, the Permittee shall continue to incorporate a pollutant load...</p> <p>Delete footnote 2</p>
III.C.1.b	Written Notices – Written notices of violation (NOVs) must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.	NYC regulations now refer to summonses rather than notices of violation or NOVs	Written Notices – Written summonses (formerly notices of violation (NOVs)) must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.
IV.D.1	Within six months of EDP, the Permittee shall develop an IDDE Plan in accordance with the “Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments” ... and provide it to the Department for its review and approval.	Not included in Table 2 - Deliverables	Add deliverable to Table 2.
IV.D.2	At EDP and annually thereafter, the Permittee will provide an updated list of IDDE points of contact for each agency.	Not included in Table 2 – Deliverables	Add deliverable to Table 2.

MS4 Permit + Fact Sheet – NYC Comments

Section/ Page	Current text	Issue	Revised text
IV.E	<p>This part (Part IV.E) applies to runoff to the Permittee’s MS4 from covered development projects, construction activities that result in a land disturbance of greater than or equal to one acre,⁷ or construction activity disturbing less than one acre if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The threshold value for land disturbance will change from one acre to 20,000 square feet and shall be implemented in accordance with the schedule included in Part IV.O Table 2.</p> <p>⁷ The threshold value for land disturbance that activates the Permittee’s approved program will change from one acre to 20,000 square feet on February 16, 2022 as stated in Table 2 of Part IV.O. of this Permit.</p>	Threshold changed as of 2/15/22	<p>This part (Part IV.E) applies to runoff to the Permittee’s MS4 from covered development projects, construction activities that result in a land disturbance of greater than or equal to one acre 20,000 square feet,⁷ or construction activity disturbing less than one acre 20,000 square feet if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The threshold value for land disturbance will change from one acre to 20,000 square feet and shall be implemented in accordance with the schedule included in Part IV.O Table 2.</p> <p>Delete footnote 7</p>
IV.F	<p>This part (Part IV.F) applies to covered development projects, construction activities that result in a land disturbance of greater than or equal to one acre, or construction activity disturbing less than one acre if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The threshold value for land disturbance will change from one acre to 20,000 square feet and shall be implemented in accordance with the schedule included in Part IV.O Table 2.</p>	Threshold changed as of 2/15/22	<p>This part (Part IV.F) applies to covered development projects, construction activities that result in a land disturbance of greater than or equal to one acre 20,000 square feet, or construction activity disturbing less than one acre 20,000 square feet if the construction activity is part of a larger common plan of development or sale that would disturb one acre 20,000 square feet or more. The threshold value for land disturbance will change from one acre to 20,000 square feet and shall be</p>

MS4 Permit + Fact Sheet – NYC Comments

Section/ Page	Current text	Issue	Revised text
			implemented in accordance with the schedule included in Part IV.O Table 2.
IV.F.1.f.iv	Practices installed by the Permittee (including any applicable projects pursuant to section IV.G.2) shall be approved per requirements in section (IV.E) and maintained in accordance with all requirements of sections IV.F.1.g.i-iii. and IV.G.	Incorrect subsection cited	... maintained in accordance with all requirements of sections IV.F.1.g.f.i-iii. and IV.G.
IV.H.2	Implement the plan to assess industrial and commercial facilities not covered under the SPDES MSGP i. Complete assessments of original inventory of approximately 1,250 unpermitted facilities within one year from EDP. ii. Continue to assess and report in the Annual Report on any newly identified, unpermitted industrial and commercial facilities.	Assessments of original inventory completed	Implement the plan to assess industrial and commercial facilities not covered under the SPDES MSGP or individual SPDES Permit i. Complete assessments of original inventory of approximately 1,250 unpermitted facilities within one year from EDP. ii. Continue to assess and report in the Annual Report on any newly identified, unpermitted industrial and commercial facilities.
IV.I.1 and Table 2 Deliverables	Commence, by March 14, 2021, a study to determine loading rate of floatable and settleable trash and debris from the MS4 to waterbodies impaired for floatables....	DEP has already commenced the study (under the 2015 Permit), so this requirement is not necessary. Revise Fact Sheet as well (see below – “commence the study to determine the baseline load six months after EDP”)	Commence, by March 14, 2021, Complete within 3 years from EDP, a study to determine the loading rate of floatable and settleable trash and debris from the MS4 to waterbodies listed as impaired for floatables in the MS4 areas, using the workplan approved by the Department. The Permittee shall complete this study within three years of commencement. If the Permittee is unable to complete the loading rate study in three years from commencement, the Permittee shall request

MS4 Permit + Fact Sheet – NYC Comments

Section/ Page	Current text	Issue	Revised text
			an extension from the Department and provide justification for the extension;
IV.M	The Permittee shall maintain the Consolidated Information Tracking System to track the information required in the permit as well as the information that the Permittee must report in the annual report.	Add that any new metrics required by renewal permit will be incorporated in CITS within 1 year of EDP and will be reflected in the next annual report after that update to CITS.	The Permittee shall maintain the Consolidated Information Tracking System to track the information required in the permit as well as the information that the Permittee must report in the annual report. Within a year of EDP, Permittee shall update CITS to include the new metrics listed below and will include those new metrics in the next annual report following those updates.
IV.O Table 2	Deliverable II.B Implementation of the new 20,000 square foot threshold for the no net increase (NNI) requirement for stormwater discharges to impaired waters without a TMDL – due June 2022	Threshold lowered to 20,000 square feet as of 2/15/22	Delete Deliverable II.B
VII. Appendix 1	Spring Creek and tribs is listed as impaired for “Garage & Refuse”	Typo	“Gar ba ge and Refuse”
VII. Appendix 2 IV.F.4	Reduce to 20,000 square feet the lot size, soil disturbance threshold for triggering the applicability of construction and post-construction stormwater management requirements at new development and redevelopment sites (per schedule in Part O)	Threshold lowered to 20,000 square feet as of 2/15/22	Delete IV.F.4
Fact Sheet			
p.3	3 rd bullet – The Permittee must provide a list of people at municipal agencies for whom to contact in the event of an illicit discharge.	Grammatical error	The Permittee must provide at EDP and update annually a list of people at municipal agencies for whom the

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			<p>Department to contact in the event of an illicit discharge.</p>
p. 3	<p>4th bullet – The permit requires erosion and sediment controls at road construction projects that disturb less than an acre of land. 5th bullet – The Permittee must implement a new threshold of 20,000 square feet for covered development projects under construction and post-construction requirements. The threshold will also apply to maintenance projects in the right of way, however, those projects will not be subject to post construction requirements.</p>	<p>Reorganize information for clarity</p>	<p>4th bullet – The Permittee has implemented a new threshold of 20,000 square feet for covered development projects, including in the right of way, under construction and post-construction requirements. However, road reconstruction projects that disturb less than an acre of land will require erosion and sediment controls only. 5th bullet – The 20,000 square foot threshold will also apply to covered maintenance projects activities in the right of way; however, those projects will not be subject to post construction requirements require erosion and sediment controls only.</p>
p. 4	<p>The Permittee is required to evaluate long term trends in the MS4 and to ultimately develop a model that can be used with the model developed by the City’s LTCP program.</p>	<p>Water quality modeling effort as defined in MS4 permit.</p>	<p>The Permittee is required to evaluate long term trends in the MS4 and to ultimately develop urban stormwater quality models to estimate runoff volume and pollutant loads for individual source areas in a watershed. that can be used with the model developed by the City’s LTCP program.</p>
p.5	<p>Top of page – “must implement a program that ensures no net increase (NNI) of POCs...”</p>	<p>Spell out 1st use of POCs in Fact Sheet</p>	<p>must implement a program that ensures no net increase (NNI) of pollutants of concern (POCs)</p>
p.5	<p>The Permittee identified three priority MS4 waterbodies under the previous permit: Coney Island Creek, featured in the approved Coney Island Creek LTCP, which will be subject to the terms dictated in the draft renewal permit under Part II.B.2.a-b and e; and Bergen Basin</p>	<p>Reference to Thurston and Bergen Basins incorrect</p>	<p>The Permittee identified three one priority MS4 waterbody waterbodies under the previous permit: Coney Island Creek, featured in the approved Coney Island Creek LTCP, which will be subject to the terms dictated in the draft renewal permit under Part II.B.2.a-b and e. ; and Bergen</p>

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	<p>and Thurston Basin, which are tributaries of Jamaica Bay and are featured in the Jamaica Bay LTCP. The Jamaica Bay LTCP s still under review by the Department, so Bergen Basin and Thurston Basin will be subject to the terms dictated in Part II.B.2.c-d of the draft renewal permit.</p>		<p>Basin and Thurston Basin, which are tributaries of Jamaica Bay and are featured in the Jamaica Bay LTCP. The Jamaica Bay LTCP s still under review by the Department, so Bergen Basin and Thurston Basin will be subject to the terms dictated in Part II.B.2.c-d of the draft renewal permit.</p>
p. 7	<p>Mapping and Illicit Discharge Detection and Elimination (IDDE)</p>	<p>None of the other major permit sections are combined – seems an odd pairing</p>	<p>Separate Mapping and IDDE into 2 sections:</p> <p>Mapping – The permit requires that the Permittee update its map of the drainage areas within the urbanized area every five years within 5 years of EDP. This program must include the following:</p> <ul style="list-style-type: none"> • A storm sewer drainage area map, showing the location of Permittee-owned or -operated MS4 outfalls discharging to surface waters of the State. This map is to be updated every five years within 5 years of EDP. <p>Illicit Discharge Detection and Elimination (IDDE) – The permit requires that the Permittee continue to implement and enforce an IDDE program. To the extent existing programs do not satisfy..., the Permittee is required to include appropriate modifications or additions in the SWMP Plan. This program must include the following:</p> <ul style="list-style-type: none"> • A law ordinance, or other ...

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			<ul style="list-style-type: none"> • A plan to detect and eliminate... • A plan to ensure staff... • The education of public employees... • A list of contacts... • The determination of appropriate BMPs... • An outfall reconnaissance inventory... • A sentinel monitoring program...
p. 9	This new threshold will go into effect in February 2022, as stated in the Unified Stormwater Rule, enacted by the NYC Council on September 27, 2020. Until then, the land disturbance threshold will remain one acre.	Reference to Unified Stormwater Rule (USWR) incorrect	This new threshold will go went into effect in on February 15 , 2022, as stated in the Unified Stormwater Rule, promulgated by DEP pursuant to legislation enacted by the NYC Council on September 27, 2020 (Local Law 91 Of 2020). Until then, the land disturbance threshold will remain one acre.
p. 9	Bottom of page – The inventory, which will include...and were both permitted by the Permittee since June 1, 2019, and implemented and authorized by the Department between March 10, 2003.	Sentence incomplete	The inventory, which will include...and were both permitted by the Permittee since June 1, 2019, and implemented and authorized by the Department between March 10, 2003 and June 1, 2019.
p.10	The Permittee must, under the draft renewal permit and pursuant to local law, reduce the lot size soil disturbance threshold for applicability of post-construction stormwater management practices to 20,000 square feet in accordance with the schedule in Table 2 (to be implemented in February 2022).	Threshold lowered to 20,000 square feet as of 2/15/22	The Permittee must has , under in accordance with the draft renewal permit and pursuant to local law, reduced the lot size soil disturbance threshold for applicability of post-construction stormwater management practices to 20,000 square feet in accordance with the schedule in Table 2 (to be implemented in as of February 15, 2022).

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p. 10	<ul style="list-style-type: none"> • Incorporates runoff reduction techniques and green infrastructure during planned municipal upgrades, if feasible and cost-effective; • Implements retrofits, where determined to be feasible and cost-effective, during major maintenance or rehabilitation of flood management projects; • Considers, when feasible, green infrastructure for planned municipal upgrades, including in the municipal right of way. Green infrastructure will be designed per specifications of the NYC Stormwater Manual. 	<p>5th and 7th bullets re: municipal upgrades are repetitive. 6th bullet should be deleted as there are no such existing projects to maintain, rehabilitate or retrofit.</p>	<p>Incorporates runoff reduction techniques and green infrastructure during planned municipal upgrades, including in the municipal right of way, if feasible and cost-effective. Green infrastructure will be designed per specifications of the NYC Stormwater Manual. Implements retrofits, where determined to be feasible and cost-effective, during major maintenance or rehabilitation of flood management projects; Considers, when feasible, green infrastructure for planned municipal upgrades, including in the municipal right of way. Green infrastructure will be designed per specifications of the NYC Stormwater Manual.</p>
pp. 10-11	<p>Pollution Prevention/Good Housekeeping for Municipal Operations – ... To meet this requirement, the Permittee must implement a plan that: Industrial Stormwater Sources – ... To meet this permit requirement, the Permittee will need to implement a program that:</p>	<p>Both sound like new rather than ongoing programs</p>	<p>PPGH – ... To meet this requirement, the Permittee must continue to implement a plan that: Industrial SW Sources ... To meet this permit requirement, the Permittee will need must continue to implement a program that:</p>
p. 11	<p>6th bullet under Industrial Stormwater sources – “Under the draft renewal permit, includes a plan to inspect and assess unpermitted industrial and commercial facilities that have the potential to generate significant</p>	<p>Misleading language. The renewal permit requires inventory to include such facilities but does not require a plan to inspect and assess them.</p>	<p>Under the draft renewal permit, Includes a plan to inspect and assess unpermitted industrial and commercial facilities that have the potential to generate significant contributions of POCs to impaired waters not covered under SPDES MSGP or individual SPDES to determine whether</p>

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	contributions of POCs to impaired waters.”		they should be referred to the Department for such coverage.
pp. 11-12	<p>Control of Floatable and Settleable Trash and Debris</p> <p>The permit requires the Permittee’s stormwater program to target and control floatable and settleable trash and debris. To meet this permit requirement, the Permittee will be required to first develop a methodology to determine baseline load and identify the best available control technologies that can be implemented within the urbanized area. Under the draft renewal permit, this is referred to as the loading rate study, and must be completed within three years of its commencement. The Permittee must also evaluate its existing programs and determine how/if they should be modified to meet the objective of minimizing the discharge of floatable materials from its separate storm sewer system. The Permittee will commence the study to determine the baseline load six months after EDP.</p>	<p>The 2015 MS4 Permit required City to:</p> <ul style="list-style-type: none"> • evaluate our existing program • identify best available technologies • Develop a methodology to determine load <p>These requirements were completed with submission of the SWMP (section 9.2, 9.3, and 9.4) and are not part of the new draft permit. Fact Sheet should also reflect Permit revisions (section IV.I.1) noted above: DEP already commenced study and must complete study within 3 years of EDP.</p>	<p>The permit requires the Permittee’s stormwater program to target and control floatable and settleable trash and debris. To meet this permit requirement, the Permittee will be required to first develop a implement the approved methodology to determine baseline load of trash and debris and identify the best available control technologies that can be implemented within the urbanized area. Under the draft renewal permit, this is referred to as the loading rate study, and must be completed within three years of its commencement of EDP. The Permittee must also evaluate its existing programs and determine how/if they should be modified to meet the objective of minimizing the discharge of floatable materials from its separate storm sewer system. The Permittee will commence the study to determine the baseline load six months after EDP.</p>
p. 12	The Permittee is required, under the draft renewal permit, to evaluate long-term trends in water quality to develop an urban stormwater quality model. The Permittee is required to report its progress to the Department on an annual basis.	Evaluating long-term trends is a separate requirement. Added more context to clarify.	The Permittee is required, under the draft renewal permit, to evaluate long-term trends in water quality and to develop an urban stormwater quality models . The Permittee is required to report its progress on the development of the models to the Department on an annual basis starting two years after EDP, and annually thereafter.

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