

EPA Response to Comments on:  
National Pollutant Discharge Elimination System (NPDES) General Permits for  
Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in  
New Hampshire (as Modified)

NPDES Permit No. NHR041000, NHR042000, and NHR043000

Dated: December 7, 2020

In accordance with the provisions of 40 C.F.R. § 124.17, this document presents EPA's responses to comments received on the Proposed Modifications to NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in the Commonwealth of New Hampshire, EPA Docket ID: EPA-R01-OW-2020-0216. EPA took public comments on the proposed permit modifications from April 23, 2020 through June 8, 2020. This Response to Comments, as well as the final permit and associated documents, should be considered collectively as EPA's response to all significant comments submitted on the proposed permit. Comments have been copied into this document "as is" with no editing or summarizing. Any comments contained in footnotes, and any documents attached to comments, are not included in this document. Each comment letter contained one or more comments that EPA excerpted and sorted according to the corresponding topic or permit part. EPA did not otherwise edit the comment excerpts. EPA has addressed all significant issues that the public comments raised. In many cases, EPA has cross-referenced similar responses. To the extent that a comment response addresses issues that other comments raised, the responses should be considered together.

## General comments

### 1. Comment from the National Association of Clean Water Agencies

NACWA considered the permit settlements as a positive progression from the original permit language which significantly departed from the statutory boundaries of the Clean Water Act's (CWA) requirements and included severely impracticable compliance requirements for stormwater permittees.

NACWA would like to thank its members in Massachusetts and New Hampshire, and in particular the Massachusetts Coalition for Water Resources Stewardship, for their stormwater expertise and tremendous patience that were instrumental in negotiating a favorable settlement.

NACWA applauds EPA Region 1 along with the other parties involved in the mediation over these permits that were able to come to a rational settlement agreement that will provide important environmental protections while simultaneously providing more than 250 impacted communities with a more flexible path forward to managing stormwater.

### 2. Comment from the Town of Bellingham:

The Town of Bellingham participated in the appeal via our membership in the Mass Coalition for Water Resource Stewardship. We support the proposed modifications to the MS4 General Permit that resulted from the mediated settlement of the permit appeal that we, and others, filed in 2016. The modified language in the General Permit demonstrates progress from the original permit language that was not only impracticable for the permittees to comply with but, more concerningly, was outside the statutory boundaries of the Clean Water Act (CWA).

The original permits would have required MS4s to adhere to strict compliance requirements beyond the maximum extent practicable (MEP) standard required by the CWA. MS4 permittees would be mandated to meet water quality standards and total maximum daily loads even when completely impracticable to do so in a given locality, which was never the way the MS4 Permit Program was intended to work. In addition, the permits would have been unachievable for many communities and would have created a substantial burden by diverting limited resources away from existing, more effective stormwater and water quality programs.

### 3. Comment from the Town of Bellingham:

The new, revised language is much more consistent with the requirements of the CWA. The proposed permit modifications produce a solution that provides important environmental protections while simultaneously giving communities a more flexible path forward to managing stormwater. While the modified permit is a step in the right direction, the general permit, as a whole, remains quite daunting. It is a complex document with requirements that are difficult and costly to implement and outcomes that are uncertain. It is our hope that EPA Region 1 will remain flexible and supportive of communities as they attempt to take on this challenge.

4. [Comment from the Massachusetts Coalition for Water Resources Stewardship:](#)  
MCWRS supports the proposed modifications to the MS4 General Permit that resulted from the mediated settlement of the permit appeal that we, and others, filed in 2016. The modified language in the General Permit demonstrates progress from the original permit language that was not only impracticable for the permittees to comply with but, more concerningly, was outside the statutory boundaries of the Clean Water Act (CWA).

The original permits would have required MS4s to adhere to strict compliance requirements beyond the maximum extent practicable (MEP) standard required by the CWA. MS4 permittees would be mandated to meet water quality standards and total maximum daily loads even when completely impracticable to do so in a given locality, which was never the way the MS4 Permit Program was intended to work. In addition, the permits would have been unachievable for many communities and would have created a substantial burden by diverting limited resources away from existing, more effective stormwater and water quality programs.

5. [Comment from the Massachusetts Coalition for Water Resources Stewardship:](#)  
The new, revised language is much more consistent with the requirements of the CWA. The proposed permit modifications produce a solution that provides important environmental protections while simultaneously giving communities a more flexible path forward to managing stormwater. While the modified permit is a step in the right direction, the general permit, as a whole, remains quite daunting. It is a complex document with requirements that are difficult and costly to implement and outcomes that are uncertain. It is our hope that EPA Region 1 will remain flexible and supportive of communities as they attempt to take on this challenge.

#### [EPA Response to Comments 1 - 5](#)

EPA acknowledges and appreciates the commenters' support for the proposed modifications that were the result of the mediated settlement. EPA disagrees with commenters' statements regarding the legal authorities for the permit provisions and these permit modifications. It is EPA's view that EPA correctly stated these provisions' underlying legal authority in the 2017 permit fact sheet and response to comments and provided the basis for these modifications in the Statement of Basis for these proposed modifications.

6. [Comment from Center For Regulatory Reasonableness, Cities of Dover and Rochester NH](#)

EPA should have been providing the permittees and the public a fact sheet, not a statement of basis, associated with the general permit amendment. *See, e.g.,* 40 C.F.R. § 124.8(a) (Requiring a fact sheet for every NPDES general permit). The fact sheet is required to include:

Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by §122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

40 C.F.R. § 124.56(a).

Among other things, the fact sheet is to set forth “the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit.” 40 C.F.R. § 124.8(a). This has not been done.

As otherwise set forth in this document, EPA has failed to provide the requisite explanations, instead leaving the permittees guessing as to EPA’s underlying rationale. EPA must provide us the opportunity to comment upon the proposed changes to Part 2.3.6.a and the definitions of “new development” and “redevelopment” after providing us the information as required by federal regulations.

#### EPA Response to Comment 6

EPA notes that the settlement agreement executed by the Center for Regulatory Reasonableness and the rest of the parties, stated: “Petitioners agree that they will not submit adverse public comments on the Draft Permit Modification, except that the Petitioners reserve their rights to submit any form of comment on EPA’s proposed modification to Part 2.3.6.a, and the definitions of “new development” and “redevelopment” in Appendix A of the Draft Permit Modification.” See *Center for Regulatory Reasonableness et al. v. EPA*, No. No. 17-1060 (D.C. Cir.) Settlement Agreement, para. 4(b). Adverse comments regarding EPA’s choice of providing a statement of basis for the proposed permit modifications are outside of the scope of comments agreed upon by the parties to the mediation. Nonetheless, EPA provided the necessary legal and technical justifications for the 2017 NH Small MS4 General Permit and these proposed modifications in the fact sheet and response to comments for the 2017 permit and the statement of basis for these proposed modifications. Although the document accompanying these draft modifications is titled a “statement of basis,” it is EPA’s view that EPA does proffer the “necessary explanation of the derivation of specific...effluent limitations and conditions...and reasons why they are applicable” as would be required in a fact sheet, according to 40 C.F.R. § 124.56(a). Specifically, on Statement of Basis pages 9-12, EPA explains and discusses the applicability of the proposed modifications in part 2.3.6.a and the definitions of “new development” and “redevelopment” that CRR refers to in this comment.

## Part 2.0

### Part 2.1

#### 7. Comment from the Massachusetts Coalition for Water Resources Stewardship and the Town of Bellingham:

We strongly support EPA's replacement of the vague and unlawful "cause and contribute to a water quality exceedance" language in Section 2.1 and elsewhere with language that better connects water quality goals with clearer, more specific actions.

#### EPA Response to Comment 7

EPA appreciates the commenter's support for the modifications to this permit. EPA disagrees with commenters' statements regarding the legal authorities for the original permit provisions and these permit modifications. It is EPA's view that EPA correctly stated these provisions' underlying legal authority in the 2017 permit fact sheet and response to comments and provided the basis for these modifications in the Statement of Basis for these proposed modifications.

### Part 2.1.1

#### 8. Comment from the National Association of Clean Water Agencies:

NACWA is pleased with the new, revised permit language under *Section 2.1.1, Requirement to Meet Water Quality Standards*. These permit revisions better align with the inherent flexibility traditionally afforded to small MS4s under the CWA (e.g., the maximum extent practicable (MEP) standard), and grant Massachusetts and New Hampshire MS4s the ability to seek an alternative compliance schedule for when pollutant reduction is no longer practicable. NACWA also applauds EPA's removal of the unlawful "cause and contribute to a water quality exceedance" language in the original permit as it required MS4s to adhere to strict compliance requirements beyond the MEP standard.

Like the original Massachusetts and New Hampshire MS4 permits, other small and large MS4s across the country are seeing a rapidly changing regulatory and permitting environment trending towards more prescriptive and stringent requirements to meet water-quality based standards. Given that these two permits were issued by EPA, NACWA had significant concerns that the overburdensome and illegal requirements for MS4s to meet water quality standards and total maximum daily load requirements in the original permit would establish a negative precedent and set off a tidal wave of similar prescriptive permit language throughout New England and likely across the country. NACWA is pleased to see that these revised permits align with the terms of the settlement agreements and reflect an approach more consistent with the CWA that will both improve water quality and provide the municipal permittees with more regulatory certainty.

#### EPA Response to Comment 8

EPA appreciates the commenter's support for these proposed permit modifications. As a result of mediation, EPA agreed to propose to modify the permit language from "reduce the discharge of pollutants such that the discharges from the MS4 do not cause or contribute to an exceedance of water quality standards" to "permittee's discharges shall meet applicable water quality standards." It is EPA's view that EPA has authority under CWA section 301(b)(1)(c) to articulate this requirement either way.

## Part 2.1.2

## Part 2.2

## Part 2.2.2

## Part 2.3.3

## Part 2.3.5

9. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

EPA's NPDES stormwater program regulates discharges of pollutants through point sources into U.S. waters from certain sized construction sites through its Construction General Permit (CGP). That permitting obligation applies to the construction site operator regardless of whether the regulated activity occurs within an MS4 or not. In its initial permits, EPA had required MS4 operators in MA and NH to implement strict and confusing mandates that potentially conflicted with and complicated a construction operator's pursuit of a CGP. While MS4 operators may develop municipal-specific controls to help meet appropriate and applicable NPDES requirements or even to address local environmental concerns, EPA's prior mandates on MS4 operators potentially and unnecessarily conflicted with elements of the CGP program and added avoidable expense to development.

For example, in the original MA and NH MS4 permits, municipalities were forced to apply low impact design (LID) and green infrastructure mandates whenever the opportunity existed for such requirements, without considering the costs of benefits of doing so in any given situation. The proposed permits provide more flexibility, including considerations regarding whether such practices are "feasible" and cost-effective. In doing so, EPA also has appropriately adopted the definition of what is "infeasible" from its Effluent Limitations Guidelines for Construction and Development, previously negotiated by EPA and NAHB.<sup>1</sup>

### EPA Response to Comment 9

EPA appreciates this comment and agrees that including a definition of "infeasible" when considering green infrastructure and low impact design practices provides greater clarity in the permit requirement.

EPA disagrees with the commenters' characterization of the 2017 Final NH Small MS4 General Permit as conflicting with elements of the CGP program and being inflexible regarding green infrastructure and low impact design.

10. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

The proposed revised MA and NH MS4 permits address concerns in Section 2.3.5 raised by NAHB during the mediation. NAHB supports the amendments that EPA has proposed for this section of both the NH and MA permits, as they make the permit easier to understand and add important clarifications. Most importantly, the Agency has clarified that municipalities may rely on EPA Region 1's CGP for compliance with this section. To the extent that requirements of the CGP already require stormwater controls, there is no need for EPA to duplicate or confuse those mandates through its small MS4 permit. The proposed permit streamlines and improves the permitting processes for both the municipalities and construction site operators while considering environmental factors more specific to the region. Furthermore, the amendments illuminate that the stormwater controls required by this permit only are for stormwater entering the MS4 system. The permit places no requirements on municipalities to regulate construction site stormwater that does not enter an MS4. NAHB has long asserted that Congress limited EPA's NPDES permitting authority over MS4s to controlling the discharge of pollutants from the MS4 system to the maximum extent practicable (MEP).<sup>2</sup>The MEP standard is undefined in the CWA, meaning that the EPA Administrator or the state NPDES authority may use their discretion to determine appropriate controls for pollutants discharged from MS4s, as long as all such methods of MEP relate to the "control of such pollutants."<sup>3</sup>The only authority Congress gave EPA over what is discharged into the MS4 system is to specifically prohibit "non-stormwater" discharges into storm sewers.<sup>4</sup>Otherwise, EPA's only authority is to develop "controls to reduce the discharge of pollutants" in stormwater discharges from MS4s "to the maximum extent practicable."<sup>5</sup>While NAHB recognizes that EPA does not necessarily agree with these limitations on its authority, NAHB believes that the proposed revisions to the MA and NH MS4 permits capture the essence of NAHB's assertions; the CGP adequately controls the discharges of pollutants from regulated operations and achieve an appropriate balance; whether discharged directly to U.S. waters or through the MS4.

EPA Response to Comment 10

EPA agrees that the proposed modifications to Section 2.3.5's organization clarify its requirements. EPA appreciates the commenter's support.

EPA has clarified that MS4 permittees may include references to required elements of EPA's Construction General Permit (CGP) (including development of a SWPPP) to the extent they are consistent with the MS4 permittee's requirements to implement a sediment and erosion control program under Part 2.3.5.3.c.

11. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

The state and/or MS4 may use its other authorities to help achieve other local environmental objectives. For Massachusetts, the State has used authority under the Clean Water Act Section

401 “certification” process to help ensure that MS4s apply controls otherwise mandated in most instances by state law (and application of the MA Stormwater Manual).<sup>6</sup>New Hampshire has asserted similar requirements through the development of model ordinances and other guidance within the state. EPA appears to have captured all of these requirements appropriately in its MA and NH revised drafts.

EPA Response to Comment 11

EPA appreciates the support for using model ordinances and guidance in the New Hampshire Small MS4 General Permit.

12. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

Finally, throughout the revised permit, EPA has more properly listed and cited those state resources required through prior 401 certifications by providing the version numbers and publication dates. This is important because more general references do not recognize that an entity could amend its manual/standard and regulators could expect municipalities to comply with the amendment, which would otherwise not have been properly vetted by the public as required under the Administrative Procedure Act

EPA Response to Comment 12

EPA appreciates the support and agrees that it is important to reference outside resources with versions and publication dates so that MS4 communities can clearly understand the applicable standards and permit requirements.

## Part 2.3.6

13. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

NAHB has asserted that EPA’s CWA authority to mandate “post-construction” stormwater controls is extremely limited and that EPA has not properly expanded the NPDES stormwater program to allow the Agency to assert more than nominal control over such discharges absent state or local assistance. Here, once again, MA and NH had used their prior Section 401 certification processes to provide EPA with authority in these MS4 permits to control post-construction stormwater discharges consistent with existing state laws and guidance. In challenging EPA Region 1’s prior MA and NH MS4 permits, NAHB had set forth its interpretation of the Agency’s limited authority, which would not justify the types of mandates included in those prior permits. More specifically, NAHB asserts that EPA’s authority under CWA section 402 is to permit the addition of pollutants from point sources to the waters of the United States.<sup>7</sup>The Agency is “powerless to regulate point sources themselves.”<sup>8</sup>In the previous Permit Section 2.3.6, the Agency required, among other things, the permittee to compel new

developments and redevelopments to meet two stringent requirements. The new development ostensibly had to: (1) retain a specified amount of stormwater onsite based on total impervious surface; and (2) remove specified amounts of total suspended solids and phosphorus. By tying the retained stormwater to impervious surface area and not pollutants, the Agency also appeared to be usurping the State's/municipality's authority over land use. Further, by setting strict TSS and phosphorous requirements, the EPA was not regulating the "addition of any pollutant to navigable waters from any point source," but regulating the addition of pollutants to a point source. Additionally, NAHB believed that EPA overstepped its authority by requiring new developments and redevelopments to recharge groundwater. This requirement did not appear to be connected to pollutants being discharged from the MS4, or even pollutants entering the MS4. The condition is required to ensure an adequate supply of groundwater exists. NAHB believes that EPA's CWA authority does not stretch that far.<sup>10</sup> Finally, the EPA required various low impact development (LID) practices and other mandates on MS4s that NAHB believed were infringing on state and local authority. EPA should not be allowed to usurp the "the primary responsibilities and rights of States to plan the development and use of land. . ."<sup>11</sup> NAHB was not merely focused on legal arguments; the very nature of home building includes earth moving activities that NAHB's members must comply with through federal, state and local stormwater regulations. While EPA's MS4 permits should be directed at municipalities, here the permit and its terms directly affect NAHB members that are the ultimate targets of some of EPA's mandates. Specifically, EPA's minimum control measures for post-construction stormwater control (one of EPA's six minimum control measures it created to further explain MEP) creates obligations for municipalities to place limitations on the development community in the form of codes, ordinances, or other enforceable mechanisms. Certain BMPs required by the prior MA and NH MS4 permits were too far removed from the stated goal of "controlling the discharge of pollutants" to state waters. Overly-prescriptive solutions targeted too far upstream of the MS4 itself can fetter permittees, denying them the flexibility to invest in better bang-for-the-buck solutions to reach water quality goals. When requirements unnecessarily meddle in existing local land use control procedures, they can be highly disruptive since those existing procedures have often been negotiated with the development community over several decades.

#### EPA Response to Comment 13

EPA acknowledges the comment. EPA notes that the 2017 NH MS4 General Permit and these modifications to that permit did not and do not require the infiltration of stormwater. Infiltration practices are provided as an option to meet pollution reduction requirements for post construction in order to provide flexibility for permit holders on how they write their bylaws or regulations for post construction stormwater control.

#### 14. Comment from Center For Regulatory Reasonableness, Cities of Dover and Rochester NH

Not only does EPA's proposed permit action fail to identify why it seeks to impose the new more stringent § 2.3.6.a requirements upon New Hampshire communities, it fails to identify why similar requirements are not imposed upon Massachusetts's communities. In contrast to the

proposed amendment to the New Hampshire general permit, EPA does not seek to impose these more stringent requirements upon any Massachusetts community.

The imposition of new more stringent requirements upon New Hampshire communities, and not in neighboring Commonwealth of Massachusetts, similarly situated discriminates against New Hampshire and inappropriately provides MS4 municipalities in Massachusetts a competitive advantage for future construction. EPA fails to explain why New Hampshire communities, but not Massachusetts communities, should be subject to the more stringent requirements. These more stringent requirements cannot possibly be deemed to be “maximum extent practicable” (“MEP”) under § 402(p)(3)(B) of the Clean Water Act for some municipalities but not for other municipalities a few miles apart, separated only by a state boundary. Moreover, the mere fact that someone proposes a level of reduction for adoption does not mean that the proposal is Practicable. Nowhere does EPA’s record or proposal indicate that EPA independently determined that the TN reductions were practicable, which includes identifying costs and methods of implementation and compliance.

Among other things, the imposition of additional requirements upon New Hampshire communities fails to provide equal protection under the law and violates Constitutional guarantees

#### [Response to comment 14](#)

This permit’s requirements necessarily differ from the Massachusetts Small MS4 General Permit requirements for several reasons, including that MEP requirements may and often do vary from state to state and can even vary in different MS4 permits within the same state, especially a large state like California or Texas. State and local regulations and practices can help to inform what the level of MEP is for each permit, which is what EPA has done here. Incorporating local New Hampshire regulations and practices into the New Hampshire permit is reasonable. No stakeholders from Massachusetts were involved in the creation of New Hampshire’s Southeast Watershed Alliance (SWA) Model Standards. For that reason, among others, it would not be reasonable for EPA to impose identical permit requirements on Massachusetts municipalities (note that the post-construction stormwater requirements for Massachusetts are based on Massachusetts’ 2008 Stormwater Manual, which is applicable only to Massachusetts). Therefore, EPA disagrees with the assertion that establishing state-specific MEP requirements based on individual states’ policies and practices “fails to provide equal protection under the law and violates Constitutional guarantees.” *See also* Responses to comments 17-25 and 26-27.

#### [15. Comment from Conservation Law Foundation](#)

In the 2017 Draft Permit EPA proposed BMP requirements to achieve removal of 80% of the average annual load of TSS and 50% of the average annual load of Total Phosphorous generated from the total post construction impervious surface at redevelopment sites. The 2020 modifications eliminate this requirement and instead incorporate the SWA Model Standards

which treats redevelopment differently from new development, and which provides in 4, Element D.:

For sites meeting the definition of a redevelopment project<sup>14</sup> and having more than 40% existing impervious surface coverage, stormwater shall be managed for water quality in accordance with one or more of the following techniques, listed in order of preference:

- i. Implement measures onsite that result in disconnection or treatment of at least 30% of the existing impervious cover as well as 50% of the additional proposed impervious surfaces and pavement areas through the application of filtration media; or
- ii. Implement other LID techniques onsite to the maximum extent practicable to provide treatment for at least 50% of the entire site area.

SWA Model Standards Section 4, Element D.1.c.

The 2020 modifications, as they relate to redevelopment, are too weak. In the first instance, the term “treatment” as used in the above-quoted provision of the SWA Model Standards is ambiguous in that it fails to describe the types of treatment required. EPA should eliminate this ambiguity, requiring the same treatment methods described in the SWA Model Standards pertaining to new development. It should also reinstate the proposal from the 2017 Draft Permit requiring the removal of 80% of the average annual load of TSS and 50% of the average annual load of Total Phosphorous. EPA should also require, for MS4 communities in the Great Bay estuary and coastal watershed, that redevelopment achieve the removal of 50% of total nitrogen, as is required for new development sites.

#### 16. Comment from Cities of Dover and Rochester NH

As indicated in the Statement of Basis for the proposed revisions to the New Hampshire MS4 General Permit, EPA proposes to now specify that permittees shall adopt ordinances that include requirements at least as stringent as certain elements of the Southeast Watershed Alliance (“SWA) Model Stormwater Standards for Coastal Watershed Communities -- which EPA purports to describe as “model standards.” The required elements under the proposal to address the discharge of pollutants from development sites includes:

1. Section 4 Element C.1: Performance Specifications for structural best management practices.
2. Section 4 Element C.3.b: Low Impact Development (LID) site planning and design requirements.
3. Section 4 Element C.3.e: Salt storage requirements.
4. Section 4 Element C.3.h: Pollution removal requirements. The provision requiring that postconstruction stormwater be treated to remove 80% of total suspended solids (TSS) and at least 50% removal of both total nitrogen and total phosphorus would apply to the twenty coastal and Great Bay Watershed communities specified in Part 2.3.6.a.i. but not to other communities.
5. Section 4 Element D: Re-development requirements. Under the proposal all New Hampshire MS4 permittees would be required to meet these requirements except that the requirements in

Section 4, Element C.3.h (e.g., the new TN requirement) would only apply to twenty communities listed in proposed Part 2.3.6.a.

The City of Dover is proud of the fact that it proactively adopted such provision within 2016 amendments to the City's Site Review Regulations, Dover Code § 153-14, *available at* <https://www.ecode360.com/33400413>.

However, the Cities of Dover and Rochester object to EPA's proposal to make such adoption mandatory, as well as EPA's proposal regarding changes to Part 2.3.6.a and the definitions of "new development" and "redevelopment." EPA should not adopt these proposed changes to the MS4 permit.

#### 17. Comment from Center For Regulatory Reasonableness, Cities of Dover and Rochester NH

Part 2.3.6.a of the proposed permit modification would impose a 50% reduction TN requirement on twenty New Hampshire municipalities. However, EPA has not identified any basis as to why these communities are singled out for such disparate treatment. The SWA Model Standards identifies (at p. 42) that there are forty-two coastal communities that should be subject to the model ordinance. Yet, EPA, inexplicably singles out twenty communities, without any explanation of the underlying reasons.

It is arbitrary and capricious for EPA to single out twenty communities for additional TN stormwater requirements – particularly where EPA has not identified any underlying basis as to why these communities should be subject to the additional requirements.

The selection of only Great Bay communities for imposition on Nitrogen reduction requirements provides for further disparity. Great Bay is not designated as nutrient impaired in the most current Section 303(d) assessments prepared by NH DES. Nor does it have a TMDL for nitrogen control. The General Permit only sought to impose minimal nutrient requirements for impaired waters and TMDL related compliance for others. Massachusetts has dozens of TMDLs and impairment listings for estuarine waters, as does Rhode Island, Connecticut and New York. These requirements are imposed by EPA in none of these areas nor has EPA objected to State MS4 programs that lacked such MEP reductions. The lone imposition of such major nitrogen reduction requirements on a subset of New Hampshire waters is plainly arbitrary and capricious.

#### 18. Comment from Center For Regulatory Reasonableness

As indicated in the Statement of Basis for the proposed revisions to the New Hampshire MS4 General Permit, EPA proposes to now specify that permittees shall adopt ordinances that include requirements at least as stringent as certain elements of the Southeast Watershed Alliance ("SWA) Model Stormwater Standards for Coastal Watershed Communities -- which EPA purports to describe as "model standards." The required elements under the proposal to address the discharge of pollutants from development sites includes:

1. Section 4 Element C.1: Performance Specifications for structural best management practices.
2. Section 4 Element C.3.b: Low Impact Development (LID) site planning and design requirements.

3. Section 4 Element C.3.e: Salt storage requirements.

4. Section 4 Element C.3.h: Pollution removal requirements. The provision requiring that post construction stormwater be treated to remove 80% of total suspended solids (TSS) and at least 50% removal of both total nitrogen and total phosphorus would apply to the twenty coastal and Great Bay Watershed communities specified in Part 2.3.6.a.i. but not to other communities.

5. Section 4 Element D: Re-development requirements.

Under the proposal all New Hampshire MS4 permittees would be required to meet these requirements except that the requirements in Section 4, Element C.3.h (e.g., the new TN requirement) would only apply to twenty communities listed in proposed Part 2.3.6.a.

CRR objects to EPA's proposal regarding changes to Part 2.3.6.a and the definitions of "new development" and "redevelopment." EPA should not adopt these proposed changes to the MS4 permit.

#### 19. Comment from Center For Regulatory Reasonableness, Cities of Dover and Rochester NH

EPA indicates in the statement of basis that some New Hampshire communities have used the SWA model ordinance, citing to a report by the Piscataqua Region Estuaries Partnership ("PREP"). The statement of basis provides:

According to the 2018 State of Our Estuaries Report by the Piscataqua Region Estuaries Partnership (PREP) (<https://www.stateofourestuaries.org/2018-reports/soeofull-report/>, retrieved June 26, 2019), eight communities within Great Bay Watershed have adopted the SWA model standards, seven communities are in the process of adoption of the SWA model standards, and five communities have partially adopted the SWA model standards for post construction stormwater management

Other than this unsupported assertion set forth in the PREP report, and EPA's blind acceptance, there is nothing in the record indicating which Great Bay Watershed communities have adopted the purported ordinance, which were in the process of adopting the ordinance and which have partially adopted Great Bay Watershed communities that EPA now proposes to mandate compliance with the purported model ordinance. Moreover, there is no information provided as to whether any of the twenty listed communities subject to TN requirements have adopted the ordinance.

The 2018 Estuaries Report indicates that of the 42 NH municipalities, 22 communities have not adopted the Southeast Watershed Alliance Model Stormwater Standards for Coastal Communities, and that an additional 5 have partial or a different set of standards. In other words, almost two-thirds of the communities (i.e., 27/42 communities) have not adopted the specific model standards EPA now proposes to impose as a mandatory

20. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

Similar to the changes EPA has proposed in Section 2.3.5 related to active construction sites and related permitting, EPA also has streamlined Section 2.3.6 to provide significantly more flexibility and to better align the mandates in the MA and NH permits with existing state mandates or guidance. In the case of MA, the post-construction requirements are tied to specific provisions of a specific version of the MA Stormwater Manual. In NH, MS4s will rely upon certain sections of the Southeast Watershed Alliance (SWA) model stormwater standards to fashion their programs to satisfy certain sections of the SWA guidance. This approach in NH replaces prior EPA efforts to reference New Hampshire's Alteration of Terrain regulations and EPA-derived pollution removal requirements. The NH regulation was a misfit for EPA's intended purpose and NAHB objected to EPA-derived standards based on its assertion that the Agency lacks such independent authority. The proposed modifications provide municipalities (and homebuilders constructing within those MS4s) with more flexibility in designing and implementing a post construction program consistent with local environmental practices. Similar to Section 2.3.5 related to active construction, EPA made considerations regarding LID more flexible for new and re-development. Furthermore, the proposal provides options for reducing pollutant discharges of TSS and phosphorus through BMPs, stormwater retention related to impervious surfaces, some combination of those two approaches, or (very importantly) off site mitigation within the local watershed when that may make more sense for the MS4 and protecting local water bodies.

21. Comment from Center for Regulatory Reasonableness, Cities of Dover and Rochester NH

EPA admits in the statement of basis that the part 2.3.6 proposed standards will impose more stringent requirements upon the Great Bay community than that currently under the 2017 NH MS4 permit:

With the comprehensive nature of the SWA model standards and its uniform adoption across New Hampshire, the proposed modification should result in greater pollutant reductions in post construction stormwater than the requirements contained in the Final 2017 Small MS4 General Permit.

EPA regulations, however, require "cause" to exist for permits to be modified, particularly to impose more stringent requirements upon the permittee. See, e.g., 40 C.F.R. § 122.62 ("If cause does not exist under this section or §122.63, the Director shall not modify or revoke and reissue the permit.") EPA has not identified any valid cause for modification of the permit.

Even if the SWA model standards were a duly promulgated legal requirement applicable to New Hampshire communities (which it is not), EPA would be without basis to modify the New Hampshire general permit to impose additional requirements. An NPDES permit can only be modified in corporate new standards upon the request of the permittee. 40 C.F.R. § 122.62(a)(3). New Hampshire municipalities have not requested modification. Specifically, we

object to modification of the permit to impose the proposed part 2.3.6(a) requirements (as well as the new definitions of “development” and “redevelopment”).

Without the permittee’s agreement, EPA does not have the authority to subject the permittee to a moving target in the permit based upon a new regulation, or similar development such as a non-binding draft of a so-called model guidance written by some purported alliance. Certainty is required so that the permittee can undertake appropriate planning during the five-year term, is intended. *See also* 40 C.F.R. § 122.43(b)(1).

Furthermore, part 2.3.6.a.ii of the existing 2017 New Hampshire MS4 general permit allowed permittees the option to meet the regulatory mechanism requirements by adopting municipal ordinances consistent with the SWA model standards. Thus, it is clear that EPA was well aware of the SWA model standards when it issued the existing permit and decided that such standards were an optional approach. EPA is without basis to now second-guess its previous permitting decision and make the SWA standards mandatory.

## 22. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

In sum, NAHB notes that EPA was able to achieve its original goals for Section 2.3.6 by working collaboratively with the states and NAHB through mediation and relying upon existing state laws and guidance. Thus, EPA does not have to assert (and is not asserting) independent authority that NAHB believes exceeds the Agency’s CWA authority. Instead, EPA can appropriately rely upon state and local requirements in Section 2.3.6. Because of these important principles that focus on state and local authority, NAHB believed that settling their litigation was relevant and important so that the MA and NH MS4 permits could be revised and implemented as expeditiously as possible to benefit homebuilders in those two states. Hence, NAHB supports the proposed revisions to Section 2.3.6 in both the MA and NH MS4 permits subject to this Notice.

## 23. Comment from Conservation Law Foundation

EPA Should Reject SWA’s Weaker Standards on Total Suspended Solids and Total Phosphorous

The permit should not be modified to embrace SWA’s weaker standards on the removal of Total Suspended Solids and Total Phosphorous from new development stormwater runoff. Under the 2017 Draft Permit permittees were required to implement best management practices (“BMPs”) for new development “designed to remove 90% of the average annual load of Total Suspended Solids (TSS) AND 60% of the average annual load of Total Phosphorous (TP) generated from the total post-construction impervious area.” 2017 Draft Permit, Section 2.3.6.a.ii.d.1.b. With the 2020 modifications’ adoption of the SWA Model Standards Section 4, Element C.3.h, stormwater management for new development would require that “[r]unoff from impervious surfaces shall be treated to achieve 80% removal of Total Suspended Solids and at least 50% removal of both total nitrogen and total phosphorous... ” 2020 modifications at 2.3.6.a.i.; SWA Model Standards Section 4, Element C.3.h. This modification will result in less removal of TSS (removal of 80%, as opposed to 90%) and less phosphorous (removal of 50%, as opposed to 60%) than was proposed in the 2017 Draft Permit. EPA’s Statement of Basis for these changes fails to provide any

explanation for the modification allowing more TSS and phosphorous in stormwater runoff. Rather, EPA explains that “[w]ith the comprehensive nature of the SWA model standards and its uniform adoption across New Hampshire, the proposed modification should result in greater pollutant reductions in post construction stormwater than the requirements contained in the Final 2017 Small MS4 General Permit.” EPA Statement of Basis, at 11. While the intent is admirable, this conclusion is erroneous. The 2020 modifications should be changed to reflect EPA’s intent to achieve greater pollution reductions and to better protect New Hampshire’s waters from TSS and phosphorous in stormwater runoff. The target reductions of TSS and phosphorous in Section 2.3.6.a.i. should be corrected to the 2017 Draft Permit levels of removal of 90% and 60%, respectively.

#### 24. Comment from Conservation Law Foundation

With the exceptions noted in these comments, CLF supports the 2020 permit modifications that reference the SWA Model Standards for post construction stormwater management, and the modifications to the definitions of “new development” and “redevelopment” to align with the SWA Model Standards. However, we urge EPA to go further in adoption of the SWA Model Standards.

The SWA Model Standards were developed to provide “minimum, consistent, and effective model stormwater management standards for coastal communities.”<sup>12</sup> EPA describes the Model Standards as being “developed through collaboration between technical experts, professional planners, and local stakeholders for coastal communities in New Hampshire” resulting in standards that “lay out minimum stormwater requirements that permittees can adopt.” EPA 2020 Statement of Basis, at 10. The 2020 Modifications adopt three of the 16 performance standards for new development stormwater management proposed in SWA Element C.3, and encourage permittees to consider the adoption of all of the SWA Model Standards. CLF recommends that all of the SWA stormwater performance standards in SWA Element C.3. (a through p) be incorporated into the permit part 2.3.6.a.i. The 16 performance standards are designed to protect water quality from stormwater runoff and, taken together, consist of the minimum recommended model stormwater management standards for new development. CLF urges the inclusion of all of the performance standards in SWA Element C.3., to be incorporated by reference into New Hampshire’s Small MS4 permit.

Incorporating all of the Element C.3. performance standards would further EPA’s stated goal of a consistent approach to stormwater management in New Hampshire through the adoption of the SWA Model Standards. As EPA recognizes:

Given the adoption of the SWA model standards in New Hampshire, the proposed modification would allow a consistent approach to stormwater management throughout New Hampshire. With the comprehensive nature of the SWA model standards and its uniform adoption across New Hampshire, the proposed modification should result in greater pollutant reductions in post construction stormwater....

EPA Statement of Basis, at 10-11.

A consistent approach to stormwater management – and important benefits for water quality – would be achieved by incorporating the SWA new development performance standards wholesale into the MS4 permit, as opposed to piecemeal.

## 25. Comment from Conservation Law Foundation

The 2017 Draft Permit did not include the removal of nitrogen from post construction stormwater runoff in Part 2.3.6.; CLF strongly urges the addition of nitrogen removal for MS4 coastal communities in the 2020 modifications to this section. Nitrogen reduction is imperative to restore the health of New Hampshire's estuarine and coastal waters, and meaningful reductions are feasible.<sup>13</sup> The current coastal communities are listed in Section 2.3.6.a.i.1. CLF is concerned that there are many New Hampshire MS4 coastal communities currently operating under an MS4 waiver, and thus not appearing on this list. This Section should be modified to clarify that that if any of those communities emerge from operating under an MS4 waiver in the future, they will be subject to the post construction nitrogen removal requirements in Section 2.3.6.a.i.

### EPA Response to Comments 15 - 25

The SWA Model Standards, published in 2012, were developed collaboratively among technical experts, professional planners, and local stakeholders for coastal communities in New Hampshire. The SWA Model Standards lay out minimum stormwater requirements that permittees can adopt. EPA is relying on a well-founded and implemented program in New Hampshire to inform MEP post construction stormwater requirements for New Hampshire regulated communities. This approach will lead to consistent and implementable permit requirements for development in New Hampshire and, as the National Association of Homebuilders (NAHB), and New Hampshire Home Builders Association (NHHBA) note, these “modifications provide municipalities (and homebuilders constructing within those MS4s) with more flexibility in designing and implementing a post construction program consistent with local environmental practices.”

As one commenter notes, the SWA Model Standards were written for 42 coastal communities in New Hampshire (this includes all Great Bay Watershed communities) but the proposal would have required only 20 to adopt the nitrogen treatment requirements in the SWA Model Standards. While it is true that 42 communities are named as part of the Southeast Watershed Alliance, only 20 of the communities are currently covered under the 2017 NH MS4 Permit and therefore were identified in the permit modifications as needing to adopt all pollution reduction requirements contained in the SWA Model Standards. The other 22 communities are either outside of the urbanized area and therefore not subject to the NH MS4 permit or have received waivers for this permit term.

As one commenter notes, the option to use the SWA Model Standards to meet post-construction storm water management in new development and redevelopment requirements (post construction stormwater management) is not new. The final 2017 NH MS4 Permit offered two options for New Hampshire MS4 communities: they could adopt the same SWA Model Standards to comply with the MEP standard for post

construction stormwater management (specifically, fully adopt the SWA Model Standards Section 4 Element C and Element D, or communities could adopt an approach at least as stringent as the SWA model standards in order to meet MEP. This allowance arose out of a comment from the City of Rochester (See 2017 Response to Comments p 240). EPA agrees that the provision in the final 2017 NH MS4 Permit did not differentiate between those communities that were part of the Southeast Watershed Alliance and those communities not in the Southeast Watershed Alliance. The proposed modifications to Part 2.3.6. attempted to rely on a successful local program as described in the Statement of Basis, but would have required some pieces of the SWA Model Ordinance to be adopted by SWA communities and others be adopted by non-SWA communities. The modifications to the NH MS4 Permit were informed not only by the 2018 State of Our Estuaries Report by the Piscataqua Region Estuaries Partnership (PREP) but also all Annual Reports submitted by permittees under the 2017 NH MS4 Permit with reference to each community's stormwater bylaws. Further review of the Annual Reports and the 2018 PREP report indicate that a total of 12 communities have adopted the SWA Model Standards fully (including the City of Dover), eight have partially incorporated elements into their municipal code, and three are in the process of adoption. This information was not known to EPA at the time of drafting the 2017 NH MS4 Permit and represents new information that justifies a permit modification. See 40 C.F.R. § 122.62(a)(2).

Since the number of communities relying on the SWA Model Standards continues to grow, in addition to the discussion above, EPA finds that the SWA Model Ordinance represents the Maximum Extent Practicable (MEP) for post-construction storm water management in new development and redevelopment requirements for all MS4 permittees in New Hampshire. In order to be as stringent as the option given to regulated communities in the final 2017 NH MS4 Permit, and to move toward a consistent approach to post construction stormwater management in New Hampshire, EPA has updated the language in Part 2.3.6 to remove the different requirements for those communities in and out of the SWA. Consistent with the option in the 2017 NH MS4 Permit, the final permit modification requires that all New Hampshire permittees – those in the SWA and those outside the SWA - adopt a regulatory mechanism that is at least as stringent as SWA Model Standards Section 4 Element C and Element D in their entirety.

For a detailed discussion of the impairments in Great Bay please see Response to Comments on the 2017 NH MS4 Permit pp 143 – 149.

The Center for Regulatory Reasonableness also commented that EPA must have “cause” to modify NPDES permits. CRR’s, NAHB’s, and CLF’s challenges to the 2017 Final NH Small MS4 Permit and the ensuing mediation and settlement agreement were the genesis for these proposed modifications. Moreover, EPA has proposed to modify this permit based on the causes for modification specified in 40 C.F.R. § 122.62(a), including § 122.62(a)(2), which allows EPA to modify a permit when presented with new information that was not available at the time of permit issuance.

## 26. Comment from Center For Regulatory Reasonableness, Cities of Dover and Rochester NH

EPA is also proposing to modify Appendix A to include revised definitions of new and redevelopment that are used in the SWA model standards based upon a 40% impervious surface criterion. This effect of this redefinition is that projects that are typically considered redevelopment would be subject to more stringent standards under the new and expanded proposed definition of “new development.”

Other than the fact that a model ordinance suggests such approach, EPA has not explained why New Hampshire municipalities should be subject to this new definition. These definitions remain unchanged in the Massachusetts MS4 draft general permit, as well as other storm water permits issued by EPA. Activities that are deemed to be “redevelopment” in other states cannot be considered to be “new development” for New Hampshire communities. Such disparity is arbitrary and capricious.

## 27. Comment from National Association of Home Builders (NAHB), the New Hampshire Home Builders Association (NHHBA) and the Home Builders & Remodelers Association of Massachusetts (HBRAMA)

The proposed revised NH MS4 permit contains a unique and slightly peculiar provision that EPA identifies in its Federal Register notice and requests comments. Specifically, EPA revised definitions for “new development” and “redevelopment” as those definitions would apply to Section 2.3.6. The SWA guidance defines those terms based on how much impervious surface is contained on a site –less than 40 percent represents “new development” and greater than 40 percent is “redevelopment.” Some parties were concerned that the revised definitions expanded the scope and jurisdiction of sites subject to the post-construction mandates, but those concerns are unwarranted. Part 2.3.6 is limited across the board by size thresholds related to EPA’s construction stormwater permit program (projects that disturb a minimum of one acre, or less than one acre if part of a larger common plan to disturb more than one acre). See Part 2.3.6.a. Therefore, the same thresholds apply in the proposed MA and NH MS4 permits, but once a project trips that size threshold, whether it qualifies as a new development or redevelopment varies slightly between the permits. NAHB and HNHBA do not object to how EPA has proposed the definitions in the New Hampshire permit.

EPA Response To Comment 26 - 27

See Response to comment 14.

The definition of “re-development” is from the SWA Model Standards. As discussed in the Statement of Basis for the Permit Modifications, the 2012 SWA Model Standards were developed collaboratively among technical experts, professional planners, and local stakeholders for coastal communities in New Hampshire. The SWA model standards lay out minimum stormwater requirements that permittees can adopt. EPA is relying on a well-founded and implemented program in New Hampshire to inform MEP post construction stormwater requirements for New Hampshire regulated communities. This approach will lead to consistent and implementable permit requirements for

development in New Hampshire. No stakeholders from Massachusetts were involved in the creation of the SWA Model Standards. Consistent with one commenter, the size threshold that triggers post construction stormwater management requirements in MS4 permits remains consistent between Massachusetts and New Hampshire and is consistent with 40 CFR 122.34(b)(5). As explained above, MEP requirements may vary from state to state, and in different types of MS4 permits within the same state, based on state and local regulations and practices to define MEP for each permit, which is what EPA has done here.

#### 28. Comment from Center For Regulatory Reasonableness, Cities of Dover and Rochester NH

A review of part 2.3.6.a.ii.a of the 2017 permit indicates that LID provisions only apply to “new development.” Section 4, Element C.3.b of the SWA Standard, however, appears to apply LID requirements to “both new development and redevelopment projects.” EPA has significantly expanded requirements but, again, has not explained the reasons. This change should not be made.

#### 29. Comment from Conservation Law Foundation

The environmental benefits of Low Impact Development are well established

CLF strongly supports the inclusion of Low Impact Development (“LID”) stormwater management as a mandatory performance standard for reducing stormwater to the maximum extent practicable (“MEP”). LID, also known as green infrastructure, is a stormwater management approach that reduces the amount of stormwater that runs off impervious surfaces and protects nearby surface waters from stormwater pollution.<sup>6</sup>

Low impact development (LID) is a stormwater management approach. Unlike conventional stormwater management, which focuses on piping stormwater away from a site to a large centralized stormwater treatment area, LID focuses on controlling stormwater by using small, decentralized methods to treat stormwater close to the source. The primary goals of LID are accomplished through site planning and treatment practices.

Once LID site planning has been used to minimize the amount of stormwater generated on the site then site-level, decentralized LID treatment practices are used to treat any stormwater runoff that resulted from development. LID treatment practices are typically designed as open, vegetated systems that rely on plants and their root systems as well as permeable soils to slow the flow of water and encourage infiltration and filtration. This reduces both the speed and amount of stormwater, as well as provides treatment of stormwater pollutants.

LID treatment practices can be used in existing development and can also be used in redevelopment projects to improve existing stormwater management. In redevelopment situations, LID focus on minimizing and disconnecting existing impervious surfaces and implementing LID treatment practice for water quality, where feasible.<sup>7</sup>

The environmental and water quality benefits of LID are well known, and LID provides considerable economic, infrastructure, and climate adaptation benefits as well.<sup>8</sup> “By implementing LID principles and practices, water can be managed in a way that reduces the impact of built areas and promotes the natural movement of water within an ecosystem or watershed. Applied on a broad scale, LID can maintain or restore a watershed’s hydrologic and ecological functions.”<sup>9</sup> CLF’s prior comments have documented in great detail the benefits of LID, and are incorporated here.

The 2020 modifications recognize and adopt LID to satisfy the MEP standard

Clean Water Act NPDES MS4 permits require controls to reduce the discharge of pollutants to the maximum extent practicable (“MEP”). CWA § 402(p)(3)(B)(iii). “MEP is the statutory standard that establishes the level of pollutant reductions that MS4 operators must achieve.” EPA 2008 Fact Sheet at 3. EPA has noted that the MEP standard is not defined and has described the standard as an iterative process.

Neither the CWA nor the stormwater regulations provide a precise definition of MEP. The lack of a precise definitions is to allow maximum flexibility in MS4 permitting. Small MS4s need flexibility to optimize reductions in stormwater pollutant loads on a location by location basis. The process of optimization will include consideration of factors such as receiving waters, specific local concerns, size of the MS4, climate, and other aspects. Pollutant reductions that represent MEP may be different for each small MS4 given the unique hydrologic and geologic concerns or features that may exist.

EPA views the MEP standard in the CWA as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness.

EPA 2008 fact sheet at 4.

In 2010 CLF wrote that LID, or green infrastructure, practices “are widely available, well proven, are generally more effective than conventional infrastructure at pollutant removal and volume reduction, and confer additional benefits to the community and the environment.”<sup>10</sup> Throughout this permit process, CLF has documented the well-established body of evidence that LID is practicable and a critically important tool for controlling stormwater to the maximum extent.

In light of the importance of LID, and the inherent flexibility EPA describes in the MEP standard, CLF urged EPA in 2013 to explicitly require LID to satisfy the MEP standard:

Based on all of the above, including EPA’s own acknowledgment of iterative enhancements of the MEP standard and the fact that LID and green infrastructure approaches are both practicable, and represent the on-the-ground management approaches that control pollutants to the maximum extent, CLF strongly urges EPA to amend the New Hampshire’s draft permit to require permittees to utilize performance standards for LID/green infrastructure for purposes of satisfying the permit’s MEP standard. Absent such requirements, the permit will not fulfill or comply with the Clean Water Act’s water quality objectives.

CLF 2013 comments at 9.

CLF has consistently argued for the inclusion of LID as the performance standard to satisfy the CWA MEP standard, and strongly supports the 2020 modifications that use LID as the MEP standard.

The 2020 modifications that incorporate LID as MEP for post construction stormwater management are found in the 2020 modifications to 2.3.6.a.i.:

The permittee... shall develop or modify, as appropriate, an ordinance or other regulatory mechanism within three (3) years of the effective date of the permit to be consistent with this part. Permittees shall consider the adoption of the Southeast Watershed Alliance's Model Stormwater Standards for Coastal Watershed Communities (SWA Model Standards). At a minimum, the ordinance or other regulatory mechanism must include water quality requirements at least as stringent as the requirements contained in Section 4 Element C.1, C.3.b., C.3.e., C.3.h., and Section 4 Element D of the SWA Model Standards.

2020 modifications to 2.3.6.a.1.

SWA Section 4, Element C.3.b., in turn, requires LID:

Low Impact Development (LID) site planning and design strategies must be used to the maximum extent practicable (MEP) in order to reduce the generation of the stormwater runoff volume for both new development and redevelopment projects (see Element D for redevelopment standards). An applicant must document in writing why LID strategies are not appropriate if not used to manage stormwater.

Southeast Watershed Alliance Model Stormwater Standards for Coastal Watershed Communities<sup>11</sup> ("SWA Model Standards"), Section 4 Element C.3.b.

CLF strongly supports this inclusion of LID to meet the MEP standard. The language in the 2020 modifications, referencing the SWA Model Standards, provides a clear statement that for new development, LID performance standards must be used to meet the MEP standard. CLF further supports the wording that the regulations must be "at least as stringent as" the relevant SWA Model Standards, which allows for more protective regulations to be adopted, if the permittees so desire, or if and when the SWA Model Standards are updated.

[EPA Response to Comments 28 - 29](#)

EPA appreciates the support and agrees that LID strategies are an important component of stormwater management locally. EPA notes that the LID requirements in the 2017 NH Small MS4 General Permit part 2.3.6.a.ii.a- c applied to both new and redevelopment, and therefore disagrees with the comment that this modification has expanded the LID provisions to apply to new and redevelopment.

See also EPA response to comment 6.

### 30. Comment from City of Manchester

Allow Off-site Mitigation for New and Redevelopment Projects - The City requests that offsite mitigation be allowed for both "new development" and "redevelopment" projects, similar to

Section 2.3.6.ii of the Massachusetts MS4 Permit. Offsite mitigation within the drainage area of the project is essential in urban environments where there is often minimal space available to address pollutant removal and groundwater recharge requirements at the project site, while meeting the overall objective of reducing pollutant loads. Flexibility is needed and should be left to the judgement of the local permitting authority based on the site-specific constraints.

Exemption for Roadway Maintenance and Improvement Projects - The City requests that EPA continue to provide exemptions for redevelopment projects that disturb one or more acres that are exclusively for maintenance and improvements of existing roadways, consistent with proposed Section 2.3.6.a.ii.4.b. of the Massachusetts MS4 permit. Roadway maintenance is routinely performed to provide safe public transit. Requiring the incorporation of structural Best Management Practices (BMPs) into existing linear systems such as roadways to remove prescribed pollutant loads can be difficult and cost prohibitive as space is limited. Nonstructural BMPs such as catch basin cleaning and street sweeping programs have been designed to limit sediment and pollutant contributions from these areas. The additional cost and time that may be required to implement additional BMPs may be prohibitive and delay the implementation of routine maintenance and improvement projects.

#### EPA Response to Comment 30

As discussed in the Statement of Basis for the permit modifications, the 2012 SWA Model Standards were developed through collaboration between technical experts, professional planners, and local stakeholders for coastal communities in New Hampshire. The SWA model standards lay out minimum stormwater requirements that permittees can adopt. EPA is relying on a well-founded and implemented program in New Hampshire to inform MEP post construction stormwater requirements for New Hampshire regulated communities. This approach will lead to consistent and implementable permit requirements for development in New Hampshire. EPA is not inclined to stray from the SWA Model Standards in this permit modification, which would cause those communities that have already adopted the Model Standards to have to change their bylaws or regulations.

#### 31. Comment from City of Portsmouth

The City's comments are limited to EPA's proposed modification to the NH MS4 permit Part 2.3.6 which seeks to amend requirements relative to the adoption of stormwater controls by ordinance and regulation relative to development and redevelopment of private property. Specifically the proposed modification uses the Southeast Watershed Alliance's (SWA) Model ordinance of 2012 as a baseline for the regulation of development and redevelopment.

The City staff currently has pending for the Planning Board's consideration a draft of updated site review regulations relative to stormwater requirements which would be as stringent, and in some aspects more stringent, than those set forth in the SW A 2012 Model. That stated, the Portsmouth Planning Board has within its existing site plan review authority the ability to waive specific site review requirements. The specific authority is found at Article II, Section 2.10, Waiver Requests which reads:

1. When the Planning Board finds by a vote of six members that a waiver will not have the effect of nullifying the spirit and intent of the City's Master Plan or these regulations, it may grant a waiver.

2. In granting waivers the Planning Board may require such conditions as will in its judgment secure the objectives of the regulations.

The City believes this type of flexibility with regard to waiver requests is necessary given the diversity of sites and special circumstances that from time-to-time confront development and redevelopment of parcels, particularly in a compact urban environment. Consequently, the final published permit should make clear that the new requirements do not abrogate or diminish the Planning Board's authority to grant waiver requests or other relief as may be spelled out in each jurisdiction's governing structure.

#### EPA Response to Comment 31

Adoption of the SWA Model Standards (or regulations that are as stringent as the SWA Model Standards) does not preclude the City from having a waiver provision in its bylaws or regulations, provided that waiver provision is not applicable to those projects that disturb greater than or equal to one acre of land or are part of a common plan of development that disturbs greater than or equal to one acre of land.

### 32. Comment from Conservation Law Foundation

CLF does not agree with the proposed 2020 modification to provide permittees three years, as opposed to two years, from the effective date of the permit to develop or modify an ordinance or regulatory mechanism under Part 2.3.6.a. consistent with the SWA Model Standards. The SWA Model Standards were adopted in 2012 and should not be considered novel standards that would require additional time for the permittees to adopt. They are not new and will not come as a surprise to the permittees. In fact, as EPA acknowledges, many communities have already adopted some or all of the standards:

The SWA model standards, published in 2012, were developed through collaboration between technical experts, professional planners, and local stakeholders for coastal communities in New Hampshire. The SWA model standards lay out minimum stormwater requirements that permittees can adopt. According to the 2018 State of our Estuaries Report by the Piscataqua Region Estuaries Partnership (PREP), eight communities within Great Bay Watershed have adopted the SWA model standards, seven communities are in the process of adoption of the SWA model standards, and five communities have partially adopted the SWA model standards for post construction stormwater management.

EPA 2020 Statement of Basis, at 10 (internal citation omitted).

Not only are communities adopting the SWA Model Standards, but EPA has referred to them in this permit since 2017. The 2017 Draft Permit gave permittees two years to develop regulations "consistent with" the SWA Model Standards, or at least as stringent as part of them, and provided a link to the 2012 Model Standards. 2017 Draft, 2.3.6.a.ii, n. 12. Permittees have been on notice since at least 2017 of these likely requirements.

EPA aptly describes the 2020 modifications as a simplification of the permit, streamlining the reference to standards already in the 2017 Draft Permit: “The proposed modification would simplify permit Part 2.3.6.a by referencing the SWA model standards in place of the requirements for performance specifications, use of low impact development, and salt management that were listed in the Final 2017 Small MS4 General Permit.” EPA 2020 Statement of Basis, at 11. This streamlining of a standard does not warrant an additional year for adoption by permittees, and EPA should not allow an additional year to pass without the control mechanisms in place. Two years, and not three, are more than enough for permittees to adopt a standard that they have known about since at least 2017 and that many have already begun adopting.

#### EPA Response to Comment 32

EPA is extending the deadline for the new development and redevelopment ordinance or other regulatory mechanism to three years. The requirements in 2.3.6 have been modified and therefore, an extra year is warranted to allow permittees time to update to the new requirements.

Part 2.3.7

Part 3.1.2

Part 4.1.4

Part 4.4.2

Appendix A

Appendix F

#### 33. Comment from the Massachusetts Coalition for Water Resources Stewardship and the Town of Bellingham:

We also strongly support the proposed revisions detailed in Appendix F that grant MS4s the ability to seek alternative compliance schedules in situations where it is impracticable for permittees to comply with pollutant reductions.

#### EPA Response to Comment 33

EPA appreciates the support for the modifications in this Part.

Appendix F part III

Appendix F Attachment 3

Appendix H