

In the Matter Of:

DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL

PUBLIC HEARING - NPDES MS4 PHASE II TIER II GENERAL PERMIT

January 25, 2023



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DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL
OF THE STATE OF DELAWARE

RE: Public Hearing: NPDES MS4)
Phase II Tier II General Permit)
Docket No. 2022-P-W-0017)

..

Virtual Public Hearing
Wednesday, January 25, 2023
6:00 p.m.

..

BEFORE: Lisa Vest, Hearing Officer
FOR THE DIVISION: Alexis Capes, DNREC

-- Transcript of Proceedings --

WILCOX & FETZER
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TABLE OF CONTENTS

	Page
Introduction by Ms. Vest	3
Presentation by Alexis Capes	11
Entry of Exhibits 1 through 11	34
Public Speakers:	
Emily Knearl, Nature Conservancy in Delaware.	36
Sarah Esposito, DelDOT	38
Conclusory Remarks by Ms. Vest	42
Certificate of Reporter	46

1 MS. VEST: Okay. Good evening. I
2 want to thank everybody for attending
3 tonight's event.

4 Janella, if you could please take
5 the screen down.

6 I want to thank everybody for
7 attending tonight's event. The day is
8 Wednesday, January 25, 2023, and we are here
9 this evening to provide the virtual platform
10 for tonight's public hearing.

11 The DNREC Division of Water is
12 conducting a public hearing on a Tier II
13 General Permit that is to be issued for new
14 Phase II Municipal Separate Storm -- I will
15 say it in a minute -- Municipal Separate
16 Storm Sewer Systems (MS4) entities under the
17 National Pollutant Discharge Elimination
18 System, or commonly referred to as N-P-D-E-S
19 or NPDES.

20 For those of you who may not
21 recognize me, my name is Lisa Vest, and
22 Secretary Garvin has designated me to be the
23 hearing officer for tonight's proceedings.

24 Just a few introductory remarks

1 before we get started tonight.

2 First and foremost, this hearing is
3 being conducted virtually. None of us are
4 gathered physically in the same location.

5 While there are no sign-in sheets
6 to document physical attendance tonight, the
7 Zoom platform does, in fact, generate an
8 attendance list that documents anybody who
9 has attended, and so the Department can keep
10 track of a record of those who are here this
11 evening.

12 And, again, I thank everybody for
13 taking the time to come out on this very gray
14 and windy Wednesday.

15 At the conclusion of these
16 introductory remarks, I will be turning the
17 hearing over to Department representatives so
18 that their brief presentation may be offered
19 into the record that's being generated at
20 this time.

21 There is a court reporter that is
22 still present. She is here virtually,
23 as well. And she will, as always, pursuant
24 to DNREC's statutory requirement for us to do

1 so, will provide a transcript. It will be
2 the only verbatim record of tonight's
3 hearing. And as soon as we receive that from
4 the court reporter, we will make sure to post
5 that on the hearing webpage dedicated to this
6 matter.

7 Following the conclusion of the
8 Department's presentation this evening, we
9 will be taking live comment.

10 There is the ability for members of
11 the public to preregister. It is open for
12 that opportunity from the minute that the
13 legal notices hit the newspapers and online
14 until such time as 12 noon on the date of the
15 hearing.

16 So if you did not happen to
17 preregister, unfortunately, you will not be
18 allowed to comment live at the hearing.
19 However, we still want to make sure that
20 there are accommodations for everybody that
21 wishes to offer comment has the ability to do
22 so.

23 And the record regarding this
24 matter will remain open for receipt of

1 written comment through February 23, 2023.

2 It's a little bit longer. Generally
3 speaking, we make sure to keep the record
4 open post hearing for at least 15 days. In
5 this particular instance, there is a lot of
6 information that's out there. We want to
7 make sure that we accommodate everybody that
8 wishes to offer comment, so it's open for
9 about 30 days.

10 I would encourage those attending
11 virtually that have an interest to offer
12 comment to go on the hearing webpage
13 dedicated to this matter. There is a lot of
14 information that's already up there.

15 The Department's exhibits,
16 including the presentation that we will be
17 seeing here in a few minutes, as well as,
18 again, the verbatim transcript from the court
19 reporter as soon as it's ready, all of that
20 will be posted up on the hearing webpage for
21 everyone to check out at their leisure and
22 convenience.

23 And also any comments that we
24 receive between now and when the record

1 closes on February 23rd, they will get posted
2 as well so everybody can see what everybody
3 is seeing.

4 And, again, I would encourage the
5 members of the public that are interested to
6 check it out.

7 Of course, all mechanisms
8 previously available by which to offer
9 Department comment regarding this matter
10 remain available. There is the United States
11 Postal Service for written comment that you
12 want to do in writing by mail.

13 There is also a couple of
14 electronic links and, of course, e-mail. And
15 all of those options are identified on the
16 public hearing pages of the Department. So
17 again, please check them out.

18 In addition to all of that, please
19 be advised that the following protocols
20 remain in place for all DNREC public
21 hearings:

22 Number 1: All comment received
23 must be limited solely to the subject matter
24 which is tonight's hearing, namely the NPDES

1 MS4 Phase II Tier II General Permits.

2 Assuming that the comments are, in
3 fact, part of that subject matter, they will
4 be incorporated into the record upon receipt
5 and, again, posted on the hearing webpage
6 dedicated to this matter.

7 Number 2: I have already said a
8 couple times, but I want to make sure that we
9 highlight it. In order to ensure that
10 everyone who wishes to offer comment for the
11 Secretary's consideration is accommodated,
12 the record will remain open through
13 February 23, 2023 for receipt of comment.

14 Number 3: There is only one
15 authentic record of tonight's proceedings,
16 and it is the legal court reporter's
17 transcript. It is the official transcript of
18 the meeting tonight.

19 Number 4: The statutory purpose of
20 tonight's hearing is to build the record with
21 regard to this pending matter and the
22 Department's proposed actions to be taken
23 regarding the same.

24 The record will consist of the

1 transcript, all comments, all exhibits, and
2 eventually the Hearing Officer's Report and
3 the Secretary's order that will document his
4 decision in this matter will all be gathered
5 together and, once again, put on the hearing
6 webpage once the matter is concluded.

7 Ultimately, Secretary Garvin will
8 issue an order following his review process
9 of the record. So, you know, stay tuned to
10 that. Sometimes, with all the information
11 that's out there, these things do take time;
12 but again, you can track the comments that
13 come in and see how the record develops by
14 watching the hearing webpage.

15 Finally, remember that all comment,
16 whether it was received prior to the hearing
17 tonight, whether it came in live from the two
18 commenters that we have that preregistered,
19 or anytime between this evening and when the
20 record closes for additional receipt of
21 comment on February 23rd, as long as it's on
22 the subject matter that we are discussing
23 tonight, and as long as it is received by the
24 mechanisms that I have outlined, the United

1 States Postal Service, e-mail, or the
2 electronic link that you can access right off
3 the hearing page, all of it will be
4 incorporated into the hearing record, posted,
5 and shared so that the public can see what
6 everybody is talking about.

7 Additionally, all comment bears the
8 same weight regardless of the way in which it
9 was received, and it all becomes part of the
10 record, and it all goes in to Secretary
11 Garvin for consideration and review prior to
12 his making a decision in this matter.

13 Again, the ultimate decision is
14 made by Secretary Garvin. There is no
15 decision about any of this information or
16 matters pending tonight.

17 Again, we just represent the
18 platform by which the public can attend and
19 hear information about the matter and, once
20 again, be reminded of the various means by
21 which you can offer comment for the
22 Secretary's consideration.

23 That being said, I am now going to
24 turn the floor over to Alexis. She is going

1 to be offering the presentation that the
2 Department has prepared regarding this
3 matter. And, Alexis, once that Power Point
4 comes up on the screen, you are good to go.

5 MS. CAPES: All right. Thank you,
6 Lisa. Can everybody hear and see me okay?

7 MS. VEST: I can see you fine and
8 hear you.

9 MS. CAPES: Okay. Next slide,
10 please. Good evening, and welcome to the
11 public hearing and presentation on the Phase
12 II Tier II (MS4) General Permit.

13 This presentation highlights the
14 third draft permit, and comments will be
15 accepted through February 23, 2023.

16 The first draft permit was put on
17 public notice in July of 2020, and comments
18 were taken for an extended time of 60 days
19 due to the pandemic and requests. And the
20 comment period closed in September of 2020.

21 The Department reviewed extensive
22 comments, and significant changes were made
23 to the permit to justify a second round of
24 public notice.

1 It went on the list again in June
2 of 2022, and comments were taken until July
3 of 2022. There were several requests for a
4 public hearing. And due to comments
5 received, additional changes to the permit
6 were made, which brings us to the third draft
7 that I will be discussing tonight.

8 The additions include Delaware's
9 Designation Criteria, the Alternative
10 Compliance Clause, and language to clarify
11 that an NOI, a Notice of Intent, will need to
12 be submitted if a public entity is located,
13 in whole or part, within urbanized areas as
14 determined by the U.S. Census Bureau.

15 There is a lot of information that
16 will be given in a short amount of time.
17 Some of the slides are very short, and others
18 contain a large number of permit elements, so
19 I may just highlight certain requirements on
20 various slides.

21 If you would like to go back and
22 view any of the presentation, the exhibits,
23 important documents, or the public hearing
24 requests, you can do so just by going to the

1 DNREC public hearing website and find all the
2 documentations and links.

3 Next slide, please. What is an
4 MS4? MS4 stands for Municipal Separate
5 Stormwater System. It is a water conveyance
6 or a system of conveyances owned by a
7 municipality or other public entity, such as
8 a city, town, county, or borough that
9 discharges stormwater into waters of the
10 state. It is not a combined sewer, and it is
11 not part of a publicly owned treatment works.

12 This picture highlights some of the
13 effects of stormwater runoff. Sediments can
14 destroy aquatic habitats and make it
15 impossible for plants to grow. Excess
16 nutrients can cause algal blooms, and
17 bacteria and pathogens can wash into swimming
18 areas and create health hazards, often
19 leading to beach closures.

20 Debris such as plastic bags can
21 suffocate and disable wildlife. And
22 household hazardous wastes can destroy
23 healthy ecosystems.

24 I am going to wave my arms here for

1 a second, because the light shut off in my
2 office. Next slide, please.

3 Currently in Delaware there is only
4 individual permits. We have one Phase I MS4
5 permit, and we have four Phase II MS4
6 permits. Next slide.

7 Under the new Phase II Tier II
8 General Permit, there will be four new
9 identified municipalities, Smyrna, Camden,
10 Laurel, and Seaford.

11 Under the 2010 Census, there was 14
12 new MS4s that were identified, and ten of
13 those were waived, which leaves the four
14 above.

15 Just a sidenote, just to highlight
16 that. Even if a public entity was not
17 identified but is located on the Urbanized
18 Area Map for the U.S. Census Bureau, they
19 will still need to submit a letter of intent.

20 Some NPDES history: Phase I
21 regulations came about in 1990 and regulates
22 discharges from large and medium MS4s and
23 construction activities, and these were
24 usually individual permits.

1 The Phase II regulations came out
2 in 1998, which regulates discharges from
3 small MS4s and construction activity. And a
4 small MS4 is not designated as a large or
5 medium and if located in an urbanized area
6 according to the latest Census data.

7 If a small MS4 is not located
8 entirely within an urbanized area, only the
9 portion that is within the urbanized area is
10 regulated. And the Phase II permits are
11 usually General Permits.

12 Next slide: So how is a small MS4
13 designated? It can be designated through
14 automatic nationwide designation, which is
15 it's located in the boundaries of an
16 urbanized area as defined by the Bureau of
17 the Census. It can never be removed from the
18 program, but it is eligible for a waiver if
19 it does meet the criteria.

20 Potential designation can be done
21 by the NPDES permitting authority, and this
22 requires an evaluation. The Phase II final
23 rule required a set of designation criteria
24 to be developed. And you will see our

1 designation criteria later on in the
2 presentation.

3 Some things that were taken into
4 account could be sensitive waters, a high
5 population density, or it's a significant
6 contributor to pollutants to the waters of
7 the United States.

8 Another means by potential
9 designation can be through a petition to the
10 NPDES permitting authority or if MS4s are
11 physically interconnected. Next slide.

12 Urbanized areas are determined by
13 the latest Census data, and the current maps
14 are based on the 2010 Census. The Census
15 Bureau has released a list of urban areas
16 based off of the 2020 Census, but still have
17 not released the maps.

18 Please note that there will no
19 longer be urban clusters or urbanized areas,
20 only an urban area, which will be defined by
21 the Census as 50,000 or more people, but this
22 will not become effective until March 2,
23 2023.

24 And for additional information,

1 please visit the links below that are
2 provided to view the Census Bureau list of
3 urban areas for 2020, the Direct Final Rule
4 of Register Notice, and also the
5 clarification of the Phase II Designation
6 Criteria.

7 Next slide: Federal regulations
8 under the Clean Water Act require an operator
9 of a small MS4 to obtain a discharge permit
10 under the National Pollutant and Discharge
11 Elimination System. And MS4s have their own
12 set of unique requirement.

13 At this time Delaware does not have
14 State MS4 regulations, and in the Title 7
15 regulations govern our pre and
16 post-construction permit requirements.

17 Next slide.

18 What is a General Permit? General
19 Permit provides NPDES permit coverage to a
20 category of class of dischargers that are
21 similar in nature. There are many permittees
22 on one permit. It still allows for a
23 co-permittee relationship. And as with an
24 individual permit, it is only current for

1 five years.

2 Next slide.

3 So tonight we are talking about the
4 Tier II General Permit. These are for MS4s
5 that are not currently allowed to discharge
6 or do not have an MS4 permit. Once they get
7 on a Tier II General Permit, after the first
8 five years of their permit cycle, during
9 their next cycle they will need to submit a
10 new notice of intent, because they will now
11 be moved to a Tier I permit.

12 And the Tier II General Permits
13 also has waiver criteria.

14 The Tier I general permits are for
15 the municipalities and other entities who
16 have individual permits right now. So they
17 will move from their individual permits on to
18 a Tier I General Permit.

19 Next slide.

20 Some documentation for the permit
21 and MS4 program are your Notices of Intent.
22 And then the Tier II General Permit requires
23 MS4 operators to control stormwater
24 discharges through the best management

1 practices, including development and
2 implementation of a Comprehensive Stormwater
3 Management Program. And this would be
4 summarized in their Stormwater Management
5 Program Plan.

6 We also have annual reports that
7 are due July 1st of every year, and this is
8 to demonstrate the progress toward your end
9 goal, and the full implementation seen by the
10 end of the five-year period.

11 Next slide.

12 Some components of the permit:

13 Part 1 is just coverages under the
14 permit.

15 Part 2 would be where your minimal
16 control measures are housed.

17 Part 3 is your program evaluation,
18 assessment, and recordkeeping.

19 Part 4 are your standard permit
20 conditions.

21 And Part 5 is where your
22 definitions and your appendices including
23 your milestones, the designation criteria,
24 and the waiver program are located.

1 Next slide.

2 The Notice of Intent process: An
3 operator must submit a Notice of Intent to
4 the Department within 60 dates after the
5 effective date of a General Permit.

6 Some of the things on the NOI
7 include the discharging entities, the
8 operator that will be responsible for the MS4
9 program, descriptive information about the
10 waters, their designated use or their
11 impairment status.

12 Next slide.

13 Stormwater management and water
14 quality requirements include reducing
15 pollutants to the maximum extent practicable,
16 effectively reducing pollutants in stormwater
17 discharges. And, again, that will include
18 the waters that receive a discharge from the
19 MS4, the number of outfalls discharging to
20 each water body, their designated uses, and
21 whether or not their water bodies are listed
22 in the Combined Watershed Assessment Reports
23 and the Clean Water Act Section 303(d) For
24 Waters Needing TMDLs.

1 Next slide.

2 So for Part 2: After the
3 Department approves the NOI, the permittee
4 will have six months from the permit
5 effective date to develop their initial
6 Stormwater Management Plan.

7 And then the final Stormwater
8 Management Plan will need to be submitted 12
9 months from the permit effective date. This
10 shall highlight a strategy to meet its
11 measurable goals and implementation of the
12 Minimum Control Measures.

13 The plan will span the entire term
14 of the permit and be reviewed and updated as
15 needed.

16 And municipalities do have the
17 option to be co-permittees, and this will be
18 done through a Memorandum of Understanding or
19 other legally binding agreement.

20 Next slide.

21 Our first Minimum Control Measure
22 is public education and outreach. This is
23 crucial to the success of a stormwater
24 management program plan by having a community

1 that is knowledgeable and informed.

2 Outreach topics could include water
3 conservation, lawn applications of
4 fertilizer, proper car washing, and pet waste
5 disposal.

6 Distribution of educational
7 materials could include newspapers, our
8 websites, brochures, and page views will help
9 to determine the effectiveness of your
10 outreach efforts.

11 So the permittee will need to,
12 within 90 days of the permit effective date,
13 establish a process so water quality
14 complaints could be reported by a hotline
15 number for a 24-hour service, determining
16 target audiences of the MS4.

17 And then within one year of the
18 effective date of the permit, conduct one
19 educational event.

20 And then within six months of the
21 permit effective date, develop an employee
22 training program that addresses topics to
23 prevent or reduce the discharge of stormwater
24 pollution.

1 And, again, all of this will need
2 to be documented in your annual report.

3 Next slide.

4 Minimum Control Measure number two
5 is public involvement and participation.
6 This encourages citizens to engage in the MS4
7 program. And some examples may include adopt
8 a stream, storm drain markings, and litter
9 pickup date.

10 The permittee will need to
11 determine, again, their target audiences and
12 what participation activities will be
13 available to the community.

14 And then within one year of the
15 effective date, perform two participation
16 activity events and summarize these in your
17 annual report.

18 Next slide.

19 Minimal Control Measure number
20 three is a list of discharge detection and
21 elimination. This is used to detect and
22 eliminate non-stormwater discharges,
23 including illegal dumping and spills.

24 Within two years of the effective

1 date of the permit, the permittee will need
2 to maintain maps of the MS4 and identify all
3 stormwater conveyances, outfalls, stormwater
4 management structures, and waters that
5 receive discharges from the MS4.

6 Within one year of the effective
7 date, develop and maintain an ordinance or
8 other regulatory means to implement and
9 enforce the program to prohibit
10 non-stormwater discharges into the MS4.

11 Next slide.

12 Within two years, you are going to
13 want -- the permittee is going to want to
14 identify priority areas that have a higher
15 likelihood of illicit discharges or illicit
16 connections or illegal dumping, develop a dry
17 weather field at that screening program to
18 assist in detecting and eliminating these
19 discharges.

20 Again, starting the first year,
21 conduct dry weather field screening for 20
22 percent of outfalls, different outfalls each
23 year.

24 You are going to want to establish

1 a system for identifying the source of the
2 illicit discharge, a legal mechanism for
3 gaining access to private properties to
4 inspect outfalls, and record all outfall
5 inspections, including flows observed,
6 results of screening and testing, and any
7 corrective actions that may have been taken.

8 Next slide.

9 The permittee will need to address
10 a way for the public to report illicit
11 discharges or complaints.

12 Within 90 days of the permit
13 effective date, the permittee will need to
14 develop procedures on how to recognize and
15 report any sanitary sewer overflows or
16 leaking on-site sewage disposal systems.

17 So for any SSO that would enter
18 into the MS4, it is categorized as an illicit
19 discharge, and the Department would need to
20 know this and then be documented in a
21 five-day letter, and then also in your annual
22 report.

23 Next slide. Minimal Control
24 Measure number four is construction site

1 stormwater runoff control. This follows all
2 requirements of the Delaware Sediment and
3 Stormwater Regulations by reducing the
4 pollutants from active construction sites.

5 This requirement can be fulfilled
6 with a cooperative agreement with a delegated
7 agency in accordance with the Delaware
8 Administrative Code 5101.

9 The delegated agency or the
10 permittee will need to review and approve
11 sediment and stormwater plans, the use and
12 maintenance of appropriate structural and
13 non-structural sediment and erosion controls,
14 and inspection and enforcement of sediment
15 and erosion controls during construction to
16 ensure that polluted runoff is not leaving
17 the construction site.

18 And then construction site
19 operators will need to control waste, such as
20 discarded construction or building material,
21 concrete truck washout, oil, litter, and
22 sanitation that may be harmful to water
23 quality.

24 Next slide.

1 The permittee will need to ensure
2 the adequate training of site contractors on
3 developed inspection to ensure that BMPs are
4 properly constructed and installed, and that
5 the delegated agency is performing these
6 actions for the MS4 jurisdiction in
7 accordance with their cooperative agreement.

8 And then within two years, develop
9 and adoption -- develop and adopt a mechanism
10 for ordinance or other regulatory means.

11 And then also procedures for the
12 public so that they would be able to submit
13 information if they had a complaint about an
14 active construction site.

15 Next slide.

16 So these are some of the things I
17 will just highlight real quick that would
18 need to be seen in a permittee's annual
19 report.

20 I look at things such as number of
21 sediment and stormwater management plans
22 reviewed, if there was any actions taken or
23 what compliance measures were put in place,
24 the percent of active construction sites that

1 are inspected once, more than once, the
2 summary of the CCR training records, and how
3 effective the program is.

4 Next slide.

5 Minimum Control Measure number five
6 is post-construction stormwater management.
7 This has all the requirements under Delaware
8 Sediment and Stormwater Regulations for
9 post-construction best management practice
10 facilities. And then this can also be
11 achieved through a delegated agency.

12 And a permittee will need to
13 address any amendments that may become
14 effective during the permit term, conduct
15 visual inspections of all stormwater
16 management systems owned and operated by the
17 permittee, identify and map all stormwater
18 management systems which may discharge to the
19 MS4 with a visual inspection of at least
20 10 percent of those management systems to
21 ensure proper function.

22 And then within three years of the
23 effective date, develop long-term operation
24 and maintenance and stormwater management

1 systems. And then also ensuring that your
2 staff is properly trained in BMP design,
3 performance, and maintenance.

4 Next slide.

5 The sixth minimum control measure
6 is pollution prevention and good
7 housekeeping. This prevents and reduces
8 runoff from permittee-owned and operated
9 facilities, including municipal operations
10 and activities within the MS4 area.

11 Some of this could include spill
12 prevention response and proper disposal of
13 waste.

14 Once again, you are going to want
15 to ensure that your staff and contractors
16 receive training annually about these
17 pollutants and how they get discharged.

18 And then within two years of the
19 permit effective date, develop a good
20 housekeeping plan for any permittee-owned
21 operated facility. And this would include
22 the site activities, a list of potential
23 pollutants, your good housekeeping
24 procedures, and any procedures that you take

1 for corrective actions. And then, of course,
2 documenting if there was a spill or any
3 response actions that were taken.

4 Next slide.

5 Within three years of the effective
6 date, report pollution prevention efforts
7 related to the following activities. So you
8 have a street sweeping program and then also
9 a catch basin cleaning program.

10 Within three years of the effective
11 date, develop standard operating procedures
12 for proper herbicide/pesticide and fertilizer
13 application and storage, snow and ice, and
14 looking at different calibrations for your
15 trucks for salt, and then looking at your
16 salt or your storage containment. And also
17 control litter control and floatables that
18 could enter into your MS4.

19 And then you can also consider,
20 when you are developing these, incorporating
21 any runoff reduction techniques and green
22 infrastructure in upgrading your systems.

23 Next slide, please.

24 Part three, part four, and part

1 five are just going to highlight. The only
2 ones I'm really going to go over here would
3 be some of the stuff we have added into this
4 draft permit.

5 I will go over the alternative
6 compliance clause. I will go over the
7 designation criteria, and also the waiver
8 criteria.

9 Next slide.

10 So the alternative compliance
11 clause was developed partially by comments we
12 had by different entities not being able to
13 complete some of their permit requirements.

14 So non-municipal permittees who do
15 not have the authority or the ability to
16 fulfill all permit requirements may request
17 alternative protocols for compliance with
18 those specified elements, such as a
19 cooperative agreement with other agencies.
20 And these requests will need to be made in
21 writing to the Department.

22 Next slide, please.

23 So designation criteria: This is
24 the potential designation through Delaware

1 NPDES permitting authority that looks at six
2 criteria and takes into account population or
3 potential growth, significant contributor of
4 pollutants, or exhibits ineffective
5 protection of water quality, discharges to
6 waters of the state that have an approved
7 TMDL, Total Maximum Daily Load, or discharges
8 to ERES waters, it shares a border with an
9 urbanized area, or a certain amount of
10 impervious coverage.

11 So this is a lot on this slide, but
12 if anybody needs to go back and look at the
13 permits, this is all in there for you to see.

14 And then the final determination
15 will be the sixth criteria.

16 Next slide.

17 So in accordance with the Clean
18 Water Act, MS4s are required to obtain a
19 discharge permit unless they are granted a
20 waiver by the NPDES permitting authority.
21 Waiver criteria, we look at population,
22 threshold of nutrients and bacteria, ERES
23 waters, new and post-construction standards,
24 and the centralized wastewater treatment.

1 For a more in-depth look at any of
2 the waiver process or criteria, please look
3 at the Tier II General Permit and Fact Sheet
4 for more detailed information.

5 Next slide, please.

6 So if there is any further
7 questions that anybody has, please contact
8 the MS4 program. I, Alexis Capes, Gordon, or
9 Gavin would be more than happy to assist you.
10 And also, just a sidenote, we are no longer
11 the Surface Water Discharges Section. We are
12 now Commercial and Government Services
13 Section.

14 Next slide, please.

15 So this concludes the presentation.
16 And listed are proposed exhibits the
17 Department would like entered into the
18 record.

19 MS. VEST: Okay. Thank you,
20 Alexis, for that presentation. There is a
21 lot of information in there.

22 Just a little bookkeeping now for
23 the benefit of the record. Are the exhibits
24 that are being displayed on the screen right

1 now in your presentation the same eleven
2 exhibits as those that have been posted to
3 the hearing webpage?

4 MS. CAPES: Yes. We did update
5 them. Exhibit 11, the index, and then also
6 the slide was updated to reflect the changes
7 of document names.

8 MS. VEST: Excellent. So the way
9 that it is being reflected now and the way
10 that it is posted online is the way that you
11 wish these exhibits to be entered into the
12 record?

13 MS. CAPES: Yes. Correct.

14 MS. VEST: Excellent. Thank you
15 for that clarification. Let the record
16 reflect that DNREC proposed Exhibits 1
17 through 11, as identified both here in the
18 Power Point presentation, as well as listed
19 and posted online to the hearing webpage
20 dedicated to this matter are hereby entered
21 into the record.

22 Alexis, is there anything else that
23 the Department wishes to offer for the record
24 at this time?

1 MS. CAPES: No, there is nothing
2 else. Thank you, Lisa.

3 MS. VEST: Thank you. Okay. Now
4 that we are done with the Department's
5 presentation, we are going to move to the
6 public comment portion of tonight's
7 proceedings.

8 As I mentioned at the beginning of
9 tonight's hearing, we do have a
10 preregistration protocol for all of our
11 public hearings.

12 Members of the public are invited
13 to preregister in order to be recognized at
14 the time of the hearing, should they wish to
15 offer live comment. We do have two people
16 that preregistered to do so.

17 And, Janella, if you will go ahead
18 and try to confirm that you have found Emily
19 Knearl. And, Emily, I apologize in advance
20 if I said your last name wrong. Have you
21 been unmuted? Can you hear me?

22 MS. KNEARL: Yes. Thank you. And
23 it's Emily Knearl, but everyone pronounces it
24 wrong, Lisa, so I'm not offended at all.

1 MS. VEST: Well, thank you for your
2 graciousness. You have three minutes.

3 (The court reporter became disconnected
4 from the Internet during part of Ms. Knearl's
5 statement but was provided her written
6 statement.)

7 MS. KNEARL: On behalf of the
8 Nature Conservancy in Delaware, I am
9 testifying this evening to provide comments
10 regarding the Phase II Municipal Separate
11 Storm Sewer System (MS4) entities MS4 Permit.

12 The Nature Conservancy is committed
13 to creating a world where people and nature
14 thrive. Formed in Delaware in 1990, TNC has
15 3,000 members statewide and manages six
16 nature preserves.

17 We advocate for policies that
18 address the causes and impacts of climate
19 change, conserves land and waters, helps our
20 cities and towns become more sustainable,
21 reduces pollutants in our air and waterways,
22 and creates more opportunities for people to
23 connect with nature.

24 TNC requests that:

1 1. Kent and Sussex be added to the
2 MS4 permit process. The two counties are
3 responsible for a sizeable portion of the
4 2010 urbanized area, and stormwater in these
5 two areas has an enormous impact on
6 Delaware's water quality.

7 If we are truly to make progress on
8 water quality as outlined by the MS4 permit
9 program, the two counties should be included
10 particularly in an era of more frequent and
11 more intense storm events.

12 2. There be a more clearly
13 articulated long-term water quality goals of
14 the MS4 program and language outlining a
15 proposed timeline for when the reductions
16 would be expected.

17 3. Stronger guidance should be
18 provided on the types of acceptable BMPs with
19 attention to green infrastructure and
20 resiliency.

21 4. Climate change considerations,
22 wherever possible, be added to the permit
23 regulatory process.

24 We often say Delaware is getting

1 ready to go underwater in many key areas.
2 And we think taking climate change into
3 account in an area, again, of more frequent
4 storms, additional flooding, and even sea
5 level rise for those folks that are hit by
6 the coast who may be relevant in this space.

7 So thank you very much for your
8 consideration. And I'm done.

9 MS. VEST: Excellent. Excellent.
10 Thank you so much, Emily, I appreciate that.

11 Moving forward now, the second of
12 the two commenters tonight will be Sarah
13 Esposito. Sarah, please acknowledge once you
14 have been unmuted and can hear me.

15 MS. ESPOSITO: Yes, I can.

16 MS. VEST: Okay. The timer has
17 been reset to three minutes, so you may begin
18 when ready.

19 MS. ESPOSITO: Good evening. I'm
20 Sarah Esposito, a Professional Engineer and
21 Program Manager of DelDOT's NPDES program.

22 Thank you for the opportunity to
23 comment and for addressing our previously
24 submitted comments from the June 2022 version

1 of the draft permit.

2 We still believe that Kent and
3 Sussex County should be listed as newly
4 identified MS4s within the Tier II Phase II
5 permit as put forth for public comment by
6 DNREC.

7 My comments are based on this
8 June 2022 draft. The new Phase II Tier II
9 permit does not include Sussex and Kent
10 Counties as newly identified MS4s in Table I,
11 nor would they meet the waiver requirements
12 set forth in the permit if they had been
13 included, due to population size.

14 However, they meet the definition
15 of an MS4 as defined in the permit, which
16 includes the term "County" as being
17 applicable.

18 To support this, New Castle County
19 is a permittee in the Phase I permit issued
20 by DNREC in 2013. Within the 2010 urbanized
21 area that DNREC used to develop the Phase II
22 Tier II permit, approximately 64 percent of
23 the permitted area in Kent County and
24 67 percent in Sussex County falls outside of

1 municipal boundaries.

2 These non-municipal areas are
3 subject to the jurisdiction of either Kent or
4 Sussex County as applicable.

5 DelDOT is suspected to have permit
6 coverage of the roads in these non-municipal
7 areas, but not the counties. The
8 non-municipal areas are included in the
9 permit's urbanized area because of high
10 population totals.

11 In fact, the non-municipal portion
12 of Kent County had the largest amount of
13 growth from 2000 to 2010 and the highest 2010
14 population compared to all other Phase II
15 permittees. Yet, they are not included in
16 the Tier II permit as drafted.

17 Of all roadways within the 2010
18 urbanized areas, approximately 21 percent of
19 Kent County and 27 percent of Sussex County
20 are designated private.

21 These roadways were not designed
22 and built to DelDOT standards and were,
23 therefore, not accepted into DelDOT's roadway
24 inventory, but were approved by Kent or

1 Sussex County respectively.

2 Besides the private roadways that
3 exist within non-municipal portions of the
4 2010 urbanized area, there are also
5 subdivision roads that are maintained by
6 DelDOT because they are built to DelDOT
7 standards but were approved for development
8 by either Kent or Sussex County.

9 These roadways make up
10 approximately 19 percent of Kent County and
11 10 percent of Sussex County within the
12 urbanized area.

13 Using the Phase I MS4 permit as
14 precedent, the post-construction stormwater
15 management of these systems are not the
16 responsibility of DelDOT and should fall to
17 the counties as it does with New Castle
18 County.

19 We hope this suffices as evidence
20 and appreciate DNREC's consideration.

21 We would like to add that DNREC
22 staff has been amenable to all the permit
23 discussions, but the topic of counties is one
24 that we see as unresolved. It will place

1 DelDOT and applicable towns and cities
2 responsible for stormwater, but not the
3 counties who have had jurisdiction over the
4 lands contained within the permitted area.

5 Thank you.

6 MS. VEST: All right. Thank you,
7 Ms. Esposito. As I said previously, we only
8 had two members of the public that
9 preregistered to speak tonight. So with them
10 both having offered their comments, we are
11 done that portion.

12 So I would just like to say a
13 couple things as kind of a reminder as we
14 wrap things up tonight.

15 Again, I want to thank everybody
16 for taking their time to come out and listen
17 to the information. As I said at the
18 beginning of the tonight's proceedings, our
19 virtual public hearings do not represent any
20 kind of decision that's been premade or
21 predesignated on any of hearing matters that
22 go to this kind of platform.

23 Rather, they are an opportunity for
24 the public to tune in, so to speak, check out

1 the information, understand what's going on,
2 be reminded of the various mechanisms by
3 which they can offer comment.

4 And, hopefully, you have gotten a
5 lot of information from both the presentation
6 and the comments that came in this evening.

7 Again, there is a hearing webpage
8 dedicated to specifically this matter that
9 was the subject matter of this hearing
10 tonight.

11 You can go online to DNREC's
12 website, go under the Administrative Law
13 section, check out the Public Hearings page,
14 and you will have a list of all the public
15 hearings that we have held. It's up to like
16 the past three or four years, because we
17 never take them down at this point.

18 But they are in chronological
19 order, so once you start scrolling down, you
20 will pretty much hit this hearing as one of
21 the first ones listed. Feel free to click on
22 that.

23 It will show you all of the
24 information that was presented tonight, all

1 of the exhibits that were entered into the
2 record. Once it comes in completed from the
3 court reporter, the hearing transcript. And,
4 of course, any additional comments that come
5 in between now and February 23rd.

6 Again, normally we keep the record
7 open for at least 15 days to provide
8 additional accommodation for people to offer
9 comment. Given all the information that is
10 going on with this particular hearing matter,
11 it's almost a full month.

12 So I would encourage everybody to
13 go onto the website, go onto this hearing
14 page, check out all the information that's
15 available.

16 And if you wish to offer comments,
17 again, you can do it by United States Postal
18 Service to 89 Kings Highway, Dover, Delaware,
19 19901.

20 I just noticed the slide is
21 incorrect. Theresa Newman is not the hearing
22 officer on this one. It's me, Lisa Vest.
23 But if you just send it to that address, it
24 will get to me.

1 You can also do it via e-mail to
2 DNRECHearingComments@delaware.gov, or the
3 DNREC comment form which you can access as a
4 jumpoff right from the hearing webpage.

5 Again, I want to thank everybody
6 for taking the time to come out and hear what
7 the Department is proposing in this matter.
8 Have a great rest of the week, and this
9 hearing is adjourned.

10 (Concluded at 6:37 p.m.)

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CERTIFICATE

I, Lorena J. Hartnett, a Notary Public and Registered Professional Reporter, do hereby certify that the foregoing is an accurate and complete transcription of the proceeding held at the time and place stated herein, and that the said proceeding was recorded by me and then reduced to typewriting under my direction, and constitutes a true record of the testimony given by said witnesses.

I further certify that I am not a relative, employee, or attorney of any of the parties or a relative or employee of either counsel, and that I am in no way interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on this 30th day of January 2023.



Lorena J. Hartnett
Registered Professional Reporter

Public Hearing - NPDES MS4 Phase II Tier II General Permit - January 25, 2023

1	4	Act 17:8 20:23 32:18
1 7:22 19:13 34:16 37:1	4 8:19 19:19 37:21	actions 8:22 25:7 27:6,22 30:1,3
10 28:20 41:11		active 26:4 27:14,24
11 34:5,17	5	activities 14:23 23:12 29:10,22 30:7
12 5:14 21:8	5 19:21	activity 15:3 23:16
14 14:11	50,000 16:21	add 41:21
15 6:4 44:7	5101 26:8	added 31:3 37:1,22
19 41:10	6	addition 7:18
1990 14:21 36:14		additional 9:20 12:5 16:24 38:4 44:4,8
19901 44:19	60 11:18 20:4	Additionally 10:7
1998 15:2	64 39:22	additions 12:8
1st 19:7	67 39:24	address 25:9 28:13 36:18 44:23
2	7	addresses 22:22
2 8:7 16:22 19:15 21:2 37:12	7 17:14	addressing 38:23
20 24:21	8	adequate 27:2
2000 40:13		Administrative 26:8 43:12
2010 14:11 16:14 37:4 39:20 40:13, 17 41:4	89 44:18	adopt 23:7 27:9
2013 39:20	9	adoption 27:9
2020 11:17,20 16:16 17:3		advance 35:19
2022 12:2,3 38:24 39:8	90 22:12 25:12	advised 7:19
2023 3:8 6:1 8:13 11:15 16:23	A	advocate 36:17
21 40:18		agencies 31:19
23 6:1 8:13 11:15	ability 5:10,21 31:15	agency 26:7,9 27:5 28:11
23rd 7:1 9:21 44:5	acceptable 37:18	agreement 21:19 26:6 27:7 31:19
24-hour 22:15	accepted 11:15 40:23	ahead 35:17
25 3:8	access 10:2 25:3	air 36:21
27 40:19	accommodate 6:7	Alexis 10:24 11:3 33:8,20 34:22
3	accommodated 8:11	algal 13:16
3 8:14 19:17 37:17	accommodation 44:8	allowed 5:18 18:5
3,000 36:15	accommodations 5:20	alternative 12:9 31:5,10,17
30 6:9	accordance 26:7 27:7 32:17	amenable 41:22
303(d) 20:23	account 16:4 32:2 38:3	amendments 28:13
	achieved 28:11	amount 12:16 32:9 40:12
	acknowledge 38:13	annual 19:6 23:2,17 25:21 27:18
		annually 29:16
		anytime 9:19
		apologize 35:19

<p>appendices 19:22</p> <p>applicable 39:17 40:4 42:1</p> <p>application 30:13</p> <p>applications 22:3</p> <p>approve 26:10</p> <p>approved 32:6 40:24 41:7</p> <p>approves 21:3</p> <p>approximately 39:22 40:18 41:10</p> <p>aquatic 13:14</p> <p>area 14:18 15:5,8,9,16 16:20 29:10 32:9 37:4 38:3 39:21,23 40:9 41:4,12 42:4</p> <p>areas 12:13 13:18 16:12,15,19 17:3 24:14 37:5 38:1 40:2,7,8,18</p> <p>arms 13:24</p> <p>articulated 37:13</p> <p>assessment 19:18 20:22</p> <p>assist 24:18 33:9</p> <p>Assuming 8:2</p> <p>attend 10:18</p> <p>attendance 4:6,8</p> <p>attended 4:9</p> <p>attending 3:2,7 6:10</p> <p>attention 37:19</p> <p>audiences 22:16 23:11</p> <p>authentic 8:15</p> <p>authority 15:21 16:10 31:15 32:1,20</p> <p>automatic 15:14</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 12:21 32:12</p> <p>bacteria 13:17 32:22</p> <p>bags 13:20</p> <p>based 16:14,16 39:7</p> <p>basin 30:9</p> <p>beach 13:19</p> <p>bears 10:7</p> <p>begin 38:17</p>	<p>beginning 35:8 42:18</p> <p>behalf 36:7</p> <p>benefit 33:23</p> <p>binding 21:19</p> <p>bit 6:2</p> <p>blooms 13:16</p> <p>BMP 29:2</p> <p>BMPS 27:3 37:18</p> <p>bodies 20:21</p> <p>body 20:20</p> <p>bookkeeping 33:22</p> <p>border 32:8</p> <p>borough 13:8</p> <p>boundaries 15:15 40:1</p> <p>brings 12:6</p> <p>brochures 22:8</p> <p>build 8:20</p> <p>building 26:20</p> <p>built 40:22 41:6</p> <p>Bureau 12:14 14:18 15:16 16:15 17:2</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>calibrations 30:14</p> <p>Camden 14:9</p> <p>Capes 11:5,9 33:8 34:4,13 35:1</p> <p>car 22:4</p> <p>Castle 39:18 41:17</p> <p>catch 30:9</p> <p>categorized 25:18</p> <p>category 17:20</p> <p>CCR 28:2</p> <p>Census 12:14 14:11,18 15:6,17 16:13,14,16,21 17:2</p> <p>centralized 32:24</p> <p>change 36:19 37:21 38:2</p> <p>check 6:21 7:6,17 42:24 43:13 44:14</p> <p>chronological 43:18</p>	<p>cities 36:20 42:1</p> <p>citizens 23:6</p> <p>city 13:8</p> <p>clarification 17:5 34:15</p> <p>clarify 12:10</p> <p>class 17:20</p> <p>clause 12:10 31:6,11</p> <p>Clean 17:8 20:23 32:17</p> <p>cleaning 30:9</p> <p>click 43:21</p> <p>climate 36:18 37:21 38:2</p> <p>closed 11:20</p> <p>closes 7:1 9:20</p> <p>closures 13:19</p> <p>clusters 16:19</p> <p>co-permittee 17:23</p> <p>co-permittees 21:17</p> <p>coast 38:6</p> <p>Code 26:8</p> <p>combined 13:10 20:22</p> <p>comment 5:9,18,21 6:1,8,12 7:9,11, 22 8:10,13 9:15,21 10:7,21 11:20 35:6,15 38:23 39:5 43:3 44:9</p> <p>commenters 9:18 38:12</p> <p>comments 6:23 8:2 9:1,12 11:14,17, 22 12:2,4 31:11 36:9 38:24 39:7 42:10 43:6 44:4,16</p> <p>Commercial 33:12</p> <p>committed 36:12</p> <p>commonly 3:18</p> <p>community 21:24 23:13</p> <p>compared 40:14</p> <p>complaint 27:13</p> <p>complaints 22:14 25:11</p> <p>complete 31:13</p> <p>completed 44:2</p> <p>compliance 12:10 27:23 31:6,10,17</p> <p>components 19:12</p> <p>Comprehensive 19:2</p>
---	--	---

<p>concluded 9:6</p> <p>concludes 33:15</p> <p>conclusion 4:15 5:7</p> <p>concrete 26:21</p> <p>conditions 19:20</p> <p>conduct 22:18 24:21 28:14</p> <p>conducted 4:3</p> <p>conducting 3:12</p> <p>confirm 35:18</p> <p>connect 36:23</p> <p>connections 24:16</p> <p>Conservancy 36:8,12</p> <p>conservation 22:3</p> <p>conserves 36:19</p> <p>consideration 8:11 10:11,22 38:8 41:20</p> <p>considerations 37:21</p> <p>consist 8:24</p> <p>constructed 27:4</p> <p>construction 14:23 15:3 25:24 26:4, 15,17,18,20 27:14,24</p> <p>contact 33:7</p> <p>contained 42:4</p> <p>containment 30:16</p> <p>contractors 27:2 29:15</p> <p>contributor 16:6 32:3</p> <p>control 18:23 19:16 21:12,21 23:4, 19 25:23 26:1,19 28:5 29:5 30:17</p> <p>controls 26:13,15</p> <p>convenience 6:22</p> <p>conveyance 13:5</p> <p>conveyances 13:6 24:3</p> <p>cooperative 26:6 27:7 31:19</p> <p>Correct 34:13</p> <p>corrective 25:7 30:1</p> <p>counties 37:2,9 39:10 40:7 41:17,23 42:3</p> <p>county 13:8 39:3,16,18,23,24 40:4, 12,19 41:1,8,10,11,18</p>	<p>couple 7:13 8:8 42:13</p> <p>court 4:21 5:4 6:18 8:16 36:3 44:3</p> <p>coverage 17:19 32:10 40:6</p> <p>coverages 19:13</p> <p>create 13:18</p> <p>creates 36:22</p> <p>creating 36:13</p> <p>criteria 12:9 15:19,23 16:1 17:6 18:13 19:23 31:7,8,23 32:2,15,21 33:2</p> <p>crucial 21:23</p> <p>current 16:13 17:24</p> <p>cycle 18:8,9</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>Daily 32:7</p> <p>data 15:6 16:13</p> <p>date 5:14 20:5 21:5,9 22:12,18,21 23:9,15 24:1,7 25:13 28:23 29:19 30:6,11</p> <p>dates 20:4</p> <p>day 3:7</p> <p>days 6:4,9 11:18 22:12 25:12 44:7</p> <p>Debris 13:20</p> <p>decision 9:4 10:12,13,15 42:20</p> <p>dedicated 5:5 6:13 8:6 34:20 43:8</p> <p>defined 15:16 16:20 39:15</p> <p>definition 39:14</p> <p>definitions 19:22</p> <p>Delaware 14:3 17:13 26:2,7 28:7 31:24 36:8,14 37:24 44:18</p> <p>Delaware's 12:8 37:6</p> <p>Deldot 40:5,22 41:6,16 42:1</p> <p>Deldot's 38:21 40:23</p> <p>delegated 26:6,9 27:5 28:11</p> <p>demonstrate 19:8</p> <p>density 16:5</p> <p>Department 4:9,17 7:9,16 11:2,21 20:4 21:3 25:19 31:21 33:17 34:23</p>	<p>Department's 5:8 6:15 8:22 35:4</p> <p>descriptive 20:9</p> <p>design 29:2</p> <p>designated 3:22 15:4,13 20:10,20 40:20</p> <p>designation 12:9 15:14,20,23 16:1,9 17:5 19:23 31:7,23,24</p> <p>designed 40:21</p> <p>destroy 13:14,22</p> <p>detailed 33:4</p> <p>detect 23:21</p> <p>detecting 24:18</p> <p>detection 23:20</p> <p>determination 32:14</p> <p>determine 22:9 23:11</p> <p>determined 12:14 16:12</p> <p>determining 22:15</p> <p>develop 21:5 22:21 24:7,16 25:14 27:8,9 28:23 29:19 30:11 39:21</p> <p>developed 15:24 27:3 31:11</p> <p>developing 30:20</p> <p>development 19:1 41:7</p> <p>develops 9:13</p> <p>Direct 17:3</p> <p>disable 13:21</p> <p>discarded 26:20</p> <p>discharge 3:17 17:9,10 18:5 20:18 22:23 23:20 25:2,19 28:18 32:19</p> <p>discharged 29:17</p> <p>dischargers 17:20</p> <p>discharges 13:9 14:22 15:2 18:24 20:17 23:22 24:5,10,15,19 25:11 32:5,7 33:11</p> <p>discharging 20:7,19</p> <p>disconnected 36:3</p> <p>discussing 9:22 12:7</p> <p>discussions 41:23</p> <p>displayed 33:24</p> <p>disposal 22:5 25:16 29:12</p>
---	---	--

<p>Distribution 22:6</p> <p>Division 3:11</p> <p>DNREC 3:11 7:20 13:1 34:16 39:6, 20,21 41:21</p> <p>DNREC's 4:24 41:20 43:11</p> <p>document 4:6 9:3 34:7</p> <p>documentation 18:20</p> <p>documentations 13:2</p> <p>documented 23:2 25:20</p> <p>documenting 30:2</p> <p>documents 4:8 12:23</p> <p>Dover 44:18</p> <p>draft 11:14,16 12:6 31:4 39:1,8</p> <p>drafted 40:16</p> <p>drain 23:8</p> <p>dry 24:16,21</p> <p>due 11:19 12:4 19:7 39:13</p> <p>dumping 23:23 24:16</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e-mail 7:14 10:1</p> <p>ecosystems 13:23</p> <p>education 21:22</p> <p>educational 22:6,19</p> <p>effective 16:22 20:5 21:5,9 22:12,18, 21 23:15,24 24:6 25:13 28:3,14,23 29:19 30:5,10</p> <p>effectively 20:16</p> <p>effectiveness 22:9</p> <p>effects 13:13</p> <p>efforts 22:10 30:6</p> <p>electronic 7:14 10:2</p> <p>elements 12:18 31:18</p> <p>eleven 34:1</p> <p>eligible 15:18</p> <p>eliminate 23:22</p> <p>eliminating 24:18</p> <p>elimination 3:17 17:11 23:21</p>	<p>Emily 35:18,19,23 38:10</p> <p>employee 22:21</p> <p>encourage 6:10 7:4 44:12</p> <p>encourages 23:6</p> <p>end 19:8,10</p> <p>enforce 24:9</p> <p>enforcement 26:14</p> <p>engage 23:6</p> <p>Engineer 38:20</p> <p>enormous 37:5</p> <p>ensure 8:9 26:16 27:1,3 28:21 29:15</p> <p>ensuring 29:1</p> <p>enter 25:17 30:18</p> <p>entered 33:17 34:11,20 44:1</p> <p>entire 21:13</p> <p>entities 3:16 18:15 20:7 31:12 36:11</p> <p>entity 12:12 13:7 14:16</p> <p>era 37:10</p> <p>ERES 32:8,22</p> <p>erosion 26:13,15</p> <p>Esposito 38:13,15,19,20 42:7</p> <p>establish 22:13 24:24</p> <p>evaluation 15:22 19:17</p> <p>evening 3:1,9 4:11 5:8 9:19 11:10 36:9 38:19 43:6</p> <p>event 3:3,7 22:19</p> <p>events 23:16 37:11</p> <p>eventually 9:2</p> <p>evidence 41:19</p> <p>examples 23:7</p> <p>Excellent 34:8,14 38:9</p> <p>Excess 13:15</p> <p>Exhibit 34:5</p> <p>exhibits 6:15 9:1 12:22 32:4 33:16, 23 34:2,11,16 44:1</p> <p>exist 41:3</p> <p>expected 37:16</p> <p>extended 11:18</p>	<p>extensive 11:21</p> <p>extent 20:15</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facilities 28:10 29:9</p> <p>facility 29:21</p> <p>fact 4:7 8:3 33:3 40:11</p> <p>fall 41:16</p> <p>falls 39:24</p> <p>February 6:1 7:1 8:13 9:21 11:15 44:5</p> <p>Federal 17:7</p> <p>Feel 43:21</p> <p>fertilizer 22:4 30:12</p> <p>field 24:17,21</p> <p>final 15:22 17:3 21:7 32:14</p> <p>Finally 9:15</p> <p>find 13:1</p> <p>fine 11:7</p> <p>five-day 25:21</p> <p>five-year 19:10</p> <p>floatables 30:17</p> <p>flooding 38:4</p> <p>floor 10:24</p> <p>flows 25:5</p> <p>folks 38:5</p> <p>foremost 4:2</p> <p>Formed 36:14</p> <p>forward 38:11</p> <p>found 35:18</p> <p>free 43:21</p> <p>frequent 37:10 38:3</p> <p>fulfill 31:16</p> <p>fulfilled 26:5</p> <p>full 19:9 44:11</p> <p>function 28:21</p>
--	---	---

<hr/> <p>G</p> <hr/> <p>gaining 25:3 Garvin 3:22 9:7 10:11,14 gathered 4:4 9:4 Gavin 33:9 general 3:13 8:1 11:12 14:8 15:11 17:18 18:4,7,12,14,18,22 20:5 33:3 Generally 6:2 generate 4:7 generated 4:19 goal 19:9 goals 21:11 37:13 good 3:1 11:4,10 29:6,19,23 38:19 Gordon 33:8 govern 17:15 Government 33:12 graciousness 36:2 granted 32:19 gray 4:13 green 30:21 37:19 grow 13:15 growth 32:3 40:13 guidance 37:17</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habitats 13:14 happen 5:16 happy 33:9 harmful 26:22 hazardous 13:22 hazards 13:18 health 13:18 healthy 13:23 hear 10:19 11:6,8 35:21 38:14 hearing 3:10,12,23 4:2,17 5:3,5,15, 18 6:4,12,20 7:16,24 8:5,20 9:2,5,14, 16 10:3,4 11:11 12:4,23 13:1 34:3,19 35:9,14 42:21 43:7,9,20 44:3,10,13,</p>	<p>21 hearings 7:21 35:11 42:19 43:13,15 held 43:15 helps 36:19 herbicide/pesticide 30:12 high 16:4 40:9 higher 24:14 highest 40:13 highlight 8:9 12:19 14:15 21:10 27:17 31:1 highlights 11:13 13:12 Highway 44:18 history 14:20 hit 5:13 38:5 43:20 hope 41:19 hotline 22:14 housed 19:16 household 13:22 housekeeping 29:7,20,23</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ice 30:13 identified 7:15 14:9,12,17 34:17 39:4,10 identify 24:2,14 28:17 identifying 25:1 II 3:12,14 8:1 11:12 14:5,7 15:1,10,22 17:5 18:4,7,12,22 33:3 36:10 39:4,8, 21,22 40:14,16 illegal 23:23 24:16 illicit 24:15 25:2,10,18 impact 37:5 impacts 36:18 impairment 20:11 impervious 32:10 implement 24:8 implementation 19:2,9 21:11 important 12:23</p>	<p>impossible 13:15 in-depth 33:1 include 12:8 20:7,14,17 22:2,7 23:7 29:11,21 39:9 included 37:9 39:13 40:8,15 includes 39:16 including 6:16 19:1,22 23:23 25:5 29:9 incorporated 8:4 10:4 incorporating 30:20 incorrect 44:21 index 34:5 individual 14:4,24 17:24 18:16,17 ineffective 32:4 information 6:6,14 9:10 10:15,19 12:15 16:24 20:9 27:13 33:4,21 42:17 43:1,5,24 44:9,14 informed 22:1 infrastructure 30:22 37:19 initial 21:5 inspect 25:4 inspected 28:1 inspection 26:14 27:3 28:19 inspections 25:5 28:15 installed 27:4 instance 6:5 intense 37:11 intent 12:11 14:19 18:10,21 20:2,3 interconnected 16:11 interest 6:11 interested 7:5 Internet 36:4 introductory 3:24 4:16 inventory 40:24 invited 35:12 involvement 23:5 issue 9:8 issued 3:13 39:19</p>
--	---	--

<hr/> <p style="text-align: center;">J</p> <hr/> <p>Janella 3:4 35:17</p> <p>January 3:8</p> <p>July 11:17 12:2 19:7</p> <p>June 12:1 38:24 39:8</p> <p>jurisdiction 27:6 40:3 42:3</p> <p>justify 11:23</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kent 37:1 39:2,9,23 40:3,12,19,24 41:8,10</p> <p>key 38:1</p> <p>kind 42:13,20,22</p> <p>Kings 44:18</p> <p>Knearl 35:19,22,23 36:7</p> <p>Knearl's 36:4</p> <p>knowledgeable 22:1</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>land 36:19</p> <p>lands 42:4</p> <p>language 12:10 37:14</p> <p>large 12:18 14:22 15:4</p> <p>largest 40:12</p> <p>latest 15:6 16:13</p> <p>Laurel 14:10</p> <p>Law 43:12</p> <p>lawn 22:3</p> <p>leading 13:19</p> <p>leaking 25:16</p> <p>leaves 14:13</p> <p>leaving 26:16</p> <p>legal 5:13 8:16 25:2</p> <p>legally 21:19</p> <p>leisure 6:21</p> <p>letter 14:19 25:21</p>	<p>level 38:5</p> <p>light 14:1</p> <p>likelihood 24:15</p> <p>limited 7:23</p> <p>link 10:2</p> <p>links 7:14 13:2 17:1</p> <p>Lisa 3:21 11:6 35:2,24 44:22</p> <p>list 4:8 12:1 16:15 17:2 23:20 29:22 43:14</p> <p>listed 20:21 33:16 34:18 39:3 43:21</p> <p>listen 42:16</p> <p>litter 23:8 26:21 30:17</p> <p>live 5:9,18 9:17 35:15</p> <p>Load 32:7</p> <p>located 12:12 14:17 15:5,7,15 19:24</p> <p>location 4:4</p> <p>long 9:21,23</p> <p>long-term 28:23 37:13</p> <p>longer 6:2 16:19 33:10</p> <p>lot 6:5,13 12:15 32:11 33:21 43:5</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made 10:14 11:22 12:6 31:20</p> <p>mail 7:12</p> <p>maintain 24:2,7</p> <p>maintained 41:5</p> <p>maintenance 26:12 28:24 29:3</p> <p>make 5:4,19 6:3,7 8:8 13:14 37:7 41:9</p> <p>making 10:12</p> <p>management 18:24 19:3,4 20:13 21:6,8,24 24:4 27:21 28:6,9,16,18,20, 24 41:15</p> <p>Manager 38:21</p> <p>manages 36:15</p> <p>map 14:18 28:17</p> <p>maps 16:13,17 24:2</p> <p>March 16:22</p>	<p>markings 23:8</p> <p>material 26:20</p> <p>materials 22:7</p> <p>matter 5:6,24 6:13 7:9,23 8:3,6,21 9:4,6,22 10:12,19 11:3 34:20 43:8,9 44:10</p> <p>matters 10:16 42:21</p> <p>maximum 20:15 32:7</p> <p>means 10:20 16:8 24:8 27:10</p> <p>measurable 21:11</p> <p>measure 21:21 23:4,19 25:24 28:5 29:5</p> <p>measures 19:16 21:12 27:23</p> <p>mechanism 25:2 27:9</p> <p>mechanisms 7:7 9:24 43:2</p> <p>medium 14:22 15:5</p> <p>meet 15:19 21:10 39:11,14</p> <p>meeting 8:18</p> <p>members 5:10 7:5 35:12 36:15 42:8</p> <p>Memorandum 21:18</p> <p>mentioned 35:8</p> <p>milestones 19:23</p> <p>minimal 19:15 23:19 25:23</p> <p>minimum 21:12,21 23:4 28:5 29:5</p> <p>minute 3:15 5:12</p> <p>minutes 6:17 36:2 38:17</p> <p>month 44:11</p> <p>months 21:4,9 22:20</p> <p>move 18:17 35:5</p> <p>moved 18:11</p> <p>Moving 38:11</p> <p>MS4 3:16 8:1 11:12 13:4 14:4,5 15:4, 7,12 17:9,14 18:6,21,23 20:8,19 22:16 23:6 24:2,5,10 25:18 27:6 28:19 29:10 30:18 33:8 36:11 37:2,8, 14 39:15 41:13</p> <p>MS4S 14:12,22 15:3 16:10 17:11 18:4 32:18 39:4,10</p> <p>municipal 3:14,15 13:4 29:9 36:10 40:1</p>
---	---	--

Public Hearing - NPDES MS4 Phase II Tier II General Permit - January 25, 2023

<p>municipalities 14:9 18:15 21:16</p> <p>municipality 13:7</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N-P-D-E-S 3:18</p> <p>names 34:7</p> <p>National 3:17 17:10</p> <p>nationwide 15:14</p> <p>nature 17:21 36:8,12,13,16,23</p> <p>needed 21:15</p> <p>Needing 20:24</p> <p>newly 39:3,10</p> <p>Newman 44:21</p> <p>newspapers 5:13 22:7</p> <p>NOI 12:11 20:6 21:3</p> <p>non-municipal 31:14 40:2,6,8,11 41:3</p> <p>non-stormwater 23:22 24:10</p> <p>non-structural 26:13</p> <p>noon 5:14</p> <p>note 16:18</p> <p>notice 11:17,24 12:11 17:4 18:10 20:2,3</p> <p>noticed 44:20</p> <p>notices 5:13 18:21</p> <p>NPDES 3:19 7:24 14:20 15:21 16:10 17:19 32:1,20 38:21</p> <p>number 7:22 8:7,14,19 12:18 20:19 22:15 23:4,19 25:24 27:20 28:5</p> <p>nutrients 13:16 32:22</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>observed 25:5</p> <p>obtain 17:9 32:18</p> <p>offended 35:24</p> <p>offer 5:21 6:8,11 7:8 8:10 10:21 34:23 35:15 43:3 44:8,16</p> <p>offered 4:18 42:10</p> <p>offering 11:1</p>	<p>office 14:2</p> <p>officer 3:23 44:22</p> <p>Officer's 9:2</p> <p>official 8:17</p> <p>oil 26:21</p> <p>on-site 25:16</p> <p>online 5:13 34:10,19 43:11</p> <p>open 5:11,24 6:4,8 8:12 44:7</p> <p>operated 28:16 29:8,21</p> <p>operating 30:11</p> <p>operation 28:23</p> <p>operations 29:9</p> <p>operator 17:8 20:3,8</p> <p>operators 18:23 26:19</p> <p>opportunities 36:22</p> <p>opportunity 5:12 38:22 42:23</p> <p>option 21:17</p> <p>options 7:15</p> <p>order 8:9 9:3,8 35:13 43:19</p> <p>ordinance 24:7 27:10</p> <p>outfall 25:4</p> <p>outfalls 20:19 24:3,22 25:4</p> <p>outlined 9:24 37:8</p> <p>outlining 37:14</p> <p>outreach 21:22 22:2,10</p> <p>overflows 25:15</p> <p>owned 13:6,11 28:16</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>pages 7:16</p> <p>pandemic 11:19</p> <p>part 8:3 10:9 12:13 13:11 19:13,15, 17,19,21 21:2 30:24 36:4</p> <p>partially 31:11</p> <p>participation 23:5,12,15</p> <p>past 43:16</p> <p>pathogens 13:17</p>	<p>pending 8:21 10:16</p> <p>people 16:21 35:15 36:13,22 44:8</p> <p>percent 24:22 27:24 28:20 39:22,24 40:18,19 41:10,11</p> <p>perform 23:15</p> <p>performance 29:3</p> <p>performing 27:5</p> <p>period 11:20 19:10</p> <p>permit 3:13 11:12,14,16,23 12:5,18 14:5,8 17:9,16,18,19,22,24 18:4,6,7, 8,11,18,20,22 19:12,14,19 20:5 21:4, 9,14 22:12,18,21 24:1 25:12 28:14 29:19 31:4,13,16 32:19 33:3 36:11 37:2,8,22 39:1,5,9,12,15,19,22 40:5, 16 41:13,22</p> <p>permit's 40:9</p> <p>permits 8:1 14:4,6,24 15:10,11 18:12,14,16,17 32:13</p> <p>permitted 39:23 42:4</p> <p>permittee 21:3 22:11 23:10 24:1,13 25:9,13 26:10 27:1 28:12,17 39:19</p> <p>permittee's 27:18</p> <p>permittee-owned 29:8,20</p> <p>permittees 17:21 31:14 40:15</p> <p>permitting 15:21 16:10 32:1,20</p> <p>pet 22:4</p> <p>petition 16:9</p> <p>Phase 3:14 8:1 11:11 14:4,5,7,20 15:1,10,22 17:5 36:10 39:4,8,19,21 40:14 41:13</p> <p>physical 4:6</p> <p>physically 4:4 16:11</p> <p>pickup 23:9</p> <p>picture 13:12</p> <p>place 7:20 27:23 41:24</p> <p>plan 19:5 21:6,8,13,24 29:20</p> <p>plans 26:11 27:21</p> <p>plants 13:15</p> <p>plastic 13:20</p> <p>platform 3:9 4:7 10:18 42:22</p> <p>point 11:3 34:18 43:17</p>
---	--	--

<p>policies 36:17</p> <p>Pollutant 3:17 17:10</p> <p>pollutants 16:6 20:15,16 26:4 29:17, 23 32:4 36:21</p> <p>polluted 26:16</p> <p>pollution 22:24 29:6 30:6</p> <p>population 16:5 32:2,21 39:13 40:10,14</p> <p>portion 15:9 35:6 37:3 40:11 42:11</p> <p>portions 41:3</p> <p>post 5:4 6:4</p> <p>post-construction 17:16 28:6,9 32:23 41:14</p> <p>Postal 7:11 10:1 44:17</p> <p>posted 6:20 7:1 8:5 10:4 34:2,10,19</p> <p>potential 15:20 16:8 29:22 31:24 32:3</p> <p>Power 11:3 34:18</p> <p>practicable 20:15</p> <p>practice 28:9</p> <p>practices 19:1</p> <p>pre 17:15</p> <p>precedent 41:14</p> <p>predesignated 42:21</p> <p>premade 42:20</p> <p>prepared 11:2</p> <p>preregister 5:11,17 35:13</p> <p>preregistered 9:18 35:16 42:9</p> <p>preregistration 35:10</p> <p>present 4:22</p> <p>presentation 4:18 5:8 6:16 11:1,11, 13 12:22 16:2 33:15,20 34:1,18 35:5 43:5</p> <p>presented 43:24</p> <p>preserves 36:16</p> <p>pretty 43:20</p> <p>prevent 22:23</p> <p>prevention 29:6,12 30:6</p> <p>prevents 29:7</p>	<p>previously 7:8 38:23 42:7</p> <p>prior 9:16 10:11</p> <p>priority 24:14</p> <p>private 25:3 40:20 41:2</p> <p>procedures 25:14 27:11 29:24 30:11</p> <p>proceedings 3:23 8:15 35:7 42:18</p> <p>process 9:8 20:2 22:13 33:2 37:2,23</p> <p>Professional 38:20</p> <p>program 15:18 18:21 19:3,5,17,24 20:9 21:24 22:22 23:7 24:9,17 28:3 30:8,9 33:8 37:9,14 38:21</p> <p>progress 19:8 37:7</p> <p>prohibit 24:9</p> <p>pronounces 35:23</p> <p>proper 22:4 28:21 29:12 30:12</p> <p>properly 27:4 29:2</p> <p>properties 25:3</p> <p>proposed 8:22 33:16 34:16 37:15</p> <p>protection 32:5</p> <p>protocol 35:10</p> <p>protocols 7:19 31:17</p> <p>provide 3:9 5:1 36:9 44:7</p> <p>provided 17:2 36:5 37:18</p> <p>public 3:10,12 5:11 7:5,16,20 10:5, 18 11:11,17,24 12:4,12,23 13:1,7 14:16 21:22 23:5 25:10 27:12 35:6, 11,12 39:5 42:8,19,24 43:13,14</p> <p>publicly 13:11</p> <p>purpose 8:19</p> <p>pursuant 4:23</p> <p>put 9:5 11:16 27:23 39:5</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 20:14 22:13 26:23 32:5 37:6, 8,13</p> <p>questions 33:7</p> <p>quick 27:17</p>	<hr/> <p style="text-align: center;">R</p> <hr/> <p>ready 6:19 38:1,18</p> <p>real 27:17</p> <p>receipt 5:24 8:4,13 9:20</p> <p>receive 5:3 6:24 20:18 24:5 29:16</p> <p>received 7:22 9:16,23 10:9 12:5</p> <p>recognize 3:21 25:14</p> <p>recognized 35:13</p> <p>record 4:10,19 5:2,23 6:3,24 8:4,12, 15,20,24 9:9,13,20 10:4,10 25:4 33:18,23 34:12,15,21,23 44:2,6</p> <p>recordkeeping 19:18</p> <p>records 28:2</p> <p>reduce 22:23</p> <p>reduces 29:7 36:21</p> <p>reducing 20:14,16 26:3</p> <p>reduction 30:21</p> <p>reductions 37:15</p> <p>referred 3:18</p> <p>reflect 34:6,16</p> <p>reflected 34:9</p> <p>regard 8:21</p> <p>Register 17:4</p> <p>regulated 15:10</p> <p>regulates 14:21 15:2</p> <p>regulations 14:21 15:1 17:7,14,15 26:3 28:8</p> <p>regulatory 24:8 27:10 37:23</p> <p>related 30:7</p> <p>relationship 17:23</p> <p>released 16:15,17</p> <p>relevant 38:6</p> <p>remain 5:24 7:10,20 8:12</p> <p>remarks 3:24 4:16</p> <p>remember 9:15</p> <p>reminded 10:20 43:2</p> <p>reminder 42:13</p>
---	---	---

Public Hearing - NPDES MS4 Phase II Tier II General Permit - January 25, 2023

<p>removed 15:17</p> <p>report 9:2 23:2,17 25:10,15,22 27:19 30:6</p> <p>reported 22:14</p> <p>reporter 4:21 5:4 6:19 36:3 44:3</p> <p>reporter's 8:16</p> <p>reports 19:6 20:22</p> <p>represent 10:17 42:19</p> <p>representatives 4:17</p> <p>request 31:16</p> <p>requests 11:19 12:3,24 31:20 36:24</p> <p>require 17:8</p> <p>required 15:23 32:18</p> <p>requirement 4:24 17:12 26:5</p> <p>requirements 12:19 17:16 20:14 26:2 28:7 31:13,16 39:11</p> <p>requires 15:22 18:22</p> <p>reset 38:17</p> <p>resiliency 37:20</p> <p>response 29:12 30:3</p> <p>responsibility 41:16</p> <p>responsible 20:8 37:3 42:2</p> <p>results 25:6</p> <p>review 9:8 10:11 26:10</p> <p>reviewed 11:21 21:14 27:22</p> <p>rise 38:5</p> <p>roads 40:6 41:5</p> <p>roadway 40:23</p> <p>roadways 40:17,21 41:2,9</p> <p>round 11:23</p> <p>rule 15:23 17:3</p> <p>runoff 13:13 26:1,16 29:8 30:21</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>salt 30:15,16</p> <p>sanitary 25:15</p> <p>sanitation 26:22</p> <p>Sarah 38:12,13,20</p>	<p>screen 3:5 11:4 33:24</p> <p>screening 24:17,21 25:6</p> <p>scrolling 43:19</p> <p>sea 38:4</p> <p>Seaford 14:10</p> <p>Secretary 3:22 9:7 10:10,14</p> <p>Secretary's 8:11 9:3 10:22</p> <p>section 20:23 33:11,13 43:13</p> <p>sediment 26:2,11,13,14 27:21 28:8</p> <p>Sediments 13:13</p> <p>send 44:23</p> <p>sensitive 16:4</p> <p>Separate 3:14,15 13:4 36:10</p> <p>September 11:20</p> <p>service 7:11 10:1 22:15 44:18</p> <p>Services 33:12</p> <p>set 15:23 17:12 39:12</p> <p>sewage 25:16</p> <p>sewer 3:16 13:10 25:15 36:11</p> <p>shared 10:5</p> <p>shares 32:8</p> <p>Sheet 33:3</p> <p>sheets 4:5</p> <p>short 12:16,17</p> <p>show 43:23</p> <p>shut 14:1</p> <p>sidenote 14:15 33:10</p> <p>sign-in 4:5</p> <p>significant 11:22 16:5 32:3</p> <p>similar 17:21</p> <p>site 25:24 26:17,18 27:2,14 29:22</p> <p>sites 26:4 27:24</p> <p>sixth 29:5 32:15</p> <p>size 39:13</p> <p>sizeable 37:3</p> <p>slide 11:9 13:3 14:2,6 15:12 16:11 17:7,17 18:2,19 19:11 20:1,12 21:1, 20 23:3,18 24:11 25:8,23 26:24 27:15 28:4 29:4 30:4,23 31:9,22 32:11,16</p>	<p>33:5,14 34:6 44:20</p> <p>slides 12:17,20</p> <p>small 15:3,4,7,12 17:9</p> <p>Smyrna 14:9</p> <p>snow 30:13</p> <p>solely 7:23</p> <p>source 25:1</p> <p>space 38:6</p> <p>span 21:13</p> <p>speak 42:9,24</p> <p>speaking 6:3</p> <p>specifically 43:8</p> <p>spill 29:11 30:2</p> <p>spills 23:23</p> <p>SSO 25:17</p> <p>staff 29:2,15 41:22</p> <p>standard 19:19 30:11</p> <p>standards 32:23 40:22 41:7</p> <p>stands 13:4</p> <p>start 43:19</p> <p>started 4:1</p> <p>starting 24:20</p> <p>state 13:10 17:14 32:6</p> <p>statement 36:5,6</p> <p>States 7:10 10:1 16:7 44:17</p> <p>statewide 36:15</p> <p>status 20:11</p> <p>statutory 4:24 8:19</p> <p>stay 9:9</p> <p>storage 30:13,16</p> <p>storm 3:14,16 23:8 36:11 37:11</p> <p>storms 38:4</p> <p>stormwater 13:5,9,13 18:23 19:2,4 20:13,16 21:6,7,23 22:23 24:3 26:1,3, 11 27:21 28:6,8,15,17,24 37:4 41:14 42:2</p> <p>strategy 21:10</p> <p>stream 23:8</p>
--	--	---

<p>street 30:8</p> <p>Stronger 37:17</p> <p>structural 26:12</p> <p>structures 24:4</p> <p>stuff 31:3</p> <p>subdivision 41:5</p> <p>subject 7:23 8:3 9:22 40:3 43:9</p> <p>submit 14:19 18:9 20:3 27:12</p> <p>submitted 12:12 21:8 38:24</p> <p>success 21:23</p> <p>suffices 41:19</p> <p>suffocate 13:21</p> <p>summarize 23:16</p> <p>summarized 19:4</p> <p>summary 28:2</p> <p>support 39:18</p> <p>Surface 33:11</p> <p>suspected 40:5</p> <p>Sussex 37:1 39:3,9,24 40:4,19 41:1, 8,11</p> <p>sustainable 36:20</p> <p>sweeping 30:8</p> <p>swimming 13:17</p> <p>system 3:18 13:5,6 17:11 25:1 36:11</p> <p>systems 3:16 25:16 28:16,18,20 29:1 30:22 41:15</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>Table 39:10</p> <p>takes 32:2</p> <p>taking 4:13 5:9 38:2 42:16</p> <p>talking 10:6 18:3</p> <p>target 22:16 23:11</p> <p>techniques 30:21</p> <p>ten 14:12</p> <p>term 21:13 28:14 39:16</p> <p>testifying 36:9</p> <p>testing 25:6</p>	<p>Theresa 44:21</p> <p>things 9:11 16:3 20:6 27:16,20 42:13,14</p> <p>threshold 32:22</p> <p>thrive 36:14</p> <p>Tier 3:12 8:1 11:12 14:7 18:4,7,11,12, 14,18,22 33:3 39:4,8,22 40:16</p> <p>time 4:13,20 5:14 9:11 11:18 12:16 17:13 34:24 35:14 42:16</p> <p>timeline 37:15</p> <p>timer 38:16</p> <p>times 8:8</p> <p>Title 17:14</p> <p>TMDL 32:7</p> <p>TMDLS 20:24</p> <p>TNC 36:14,24</p> <p>tonight 4:1,6 8:18 9:17,23 10:16 12:7 18:3 38:12 42:9,14 43:10,24</p> <p>tonight's 3:3,7,10,23 5:2 7:24 8:15, 20 35:6,9 42:18</p> <p>topic 41:23</p> <p>topics 22:2,22</p> <p>Total 32:7</p> <p>totals 40:10</p> <p>town 13:8</p> <p>towns 36:20 42:1</p> <p>track 4:10 9:12</p> <p>trained 29:2</p> <p>training 22:22 27:2 28:2 29:16</p> <p>transcript 5:1 6:18 8:17 9:1 44:3</p> <p>treatment 13:11 32:24</p> <p>truck 26:21</p> <p>trucks 30:15</p> <p>tune 42:24</p> <p>tuned 9:9</p> <p>turn 10:24</p> <p>turning 4:16</p> <p>types 37:18</p>	<hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. 12:14 14:18</p> <p>ultimate 10:13</p> <p>Ultimately 9:7</p> <p>understand 43:1</p> <p>Understanding 21:18</p> <p>underwater 38:1</p> <p>unique 17:12</p> <p>United 7:10 9:24 16:7 44:17</p> <p>unmuted 35:21 38:14</p> <p>unresolved 41:24</p> <p>update 34:4</p> <p>updated 21:14 34:6</p> <p>upgrading 30:22</p> <p>urban 16:15,19,20 17:3</p> <p>urbanized 12:13 14:17 15:5,8,9,16 16:12,19 32:9 37:4 39:20 40:9,18 41:4,12</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>verbatim 5:2 6:18</p> <p>version 38:24</p> <p>Vest 3:1,21 11:7 33:19 34:8,14 35:3 36:1 38:9,16 42:6 44:22</p> <p>view 12:22 17:2</p> <p>views 22:8</p> <p>virtual 3:9 42:19</p> <p>virtually 4:3,22 6:11</p> <p>visit 17:1</p> <p>visual 28:15,19</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waived 14:13</p> <p>waiver 15:18 18:13 19:24 31:7 32:20, 21 33:2 39:11</p> <p>wash 13:17</p> <p>washing 22:4</p>
--	---	---

washout 26:21
waste 22:4 26:19 29:13
wastes 13:22
wastewater 32:24
watching 9:14
water 3:11 13:5 17:8 20:13,20,21,23
22:2,13 26:22 32:5,18 33:11 37:6,8,
13
waters 13:9 16:4,6 20:10,18,24 24:4
32:6,8,23 36:19
Watershed 20:22
waterways 36:21
wave 13:24
weather 24:17,21
webpage 5:5 6:12,20 8:5 9:6,14
34:3,19 43:7
website 13:1 43:12 44:13
websites 22:8
Wednesday 3:8 4:14
weight 10:8
wildlife 13:21
windy 4:14
wishes 5:21 6:8 8:10 34:23
works 13:11
world 36:13
wrap 42:14
writing 7:12 31:21
written 6:1 7:11 36:5
wrong 35:20,24

Y

year 19:7 22:17 23:14 24:6,20,23
years 18:1,8 23:24 24:12 27:8 28:22
29:18 30:5,10 43:16

Z

Zoom 4:7