

Summary of Public Comments and Responses for The Phase II MS4 Tier I General Permit

NPDES Permit Number: DE 0051195
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List of Commenters

Name	Affiliation	Document Control Number
Stephanie Briggs	University of Delaware	08042022-001
Kelley Dinsmore	City of Newark	08042022-002
Sara Esposito	Delaware Department of Transportation	08042022-003
Lisa Mastropolo	American Rivers	08042022-004
Collen Walters	River Network	08042022-005
Emily Knearl (2020)	Delaware Nature Society	08042022-006
Emily Knearl (2022)	The Nature Conservancy	08042022-007
Joshua Barth	The City of Dover	08042022-008

Comments

1.0 Comments Related to the General Permit Issuance Process and General Comments

1.1 General comments on the comprehensive general permit and review of the required Storm Water Management Program Plan

Comment 1.1.1: All commenters requested that references to the Department reviewing and approving the SWMP Plan be removed from the permit.

Response: The Department states in the Fact Sheet that the Tier I General Permit was developed as a Comprehensive General Permit. The Remand Rule under 40 C.F.R. §122.34(a) specifies that “the NPDES permitting authority must include Public Notice Date: July 6, 2020, Phase II MS4 Tier I GP Fact Sheet permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality and satisfy the appropriate water requirements of the Clean Water Act.” In addition, this regulation specifies that permit requirements “must be expressed in clear, specific, and measurable terms.” To address the regulatory changes in the Remand Rule and associated guidance, the Department has developed this Tier I General Permit to meet the “Comprehensive General Permit” option as provided in 40 C.F.R. §122.28(d)(1) with the additional requirement for the Department to public notice their proposed Pollutant Reduction Plan as required by 40 C.F.R. §122.28(d)(2)(ii).

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This hybrid approach allows the Department to offer a general permit with clear, specific, and measurable terms and conditions while still providing the flexibility permittees need to develop appropriate Pollutant Reduction Plans for their respective watersheds and meet their water quality requirements. While the Department will not approve SWMPs, they are required to be submitted to the Department for review of administrative completeness as having and maintaining a SWMP is a requirement of the permit.

Comment 1.1.2: One commenter (002) provided the following general comment: **References to Federal Regulations Should Be Removed If They Will Cause Confusion**. Part II.D.6 requires that a permittee implement a good housekeeping plan “in accordance with 40 C.F.R. §122.34(b)(6).” 2022 Draft, p. 14. The GP then goes on to spell out specific requirements for MCM-6 over multiple pages. Citing a specific regulatory requirement and then laying out specific terms creates a risk of inconsistency between the law and the GP; this could put a permittee in the untenable position of having to determine whether to follow the federal regulations or the GP. Although the GP draws its requirements from the federal regulations, a permittee should be able to read the permit and easily understand expectations for compliance. For this reason, the commenter requests that the Department remove specific regulatory references as shown on the attached redlined GP.

Response: The Department references regulations for clarity to permittees and the public reviewing the general permit. Permittees are required to abide by federal regulations whether cited in the permit or not. Further, since the cited regulations are the basis of the permit requirements, citing them is entirely appropriate. Permittees should contact the Department’s MS4 program staff if there appears to be a conflict between regulations and the permit or if there is a need for clarification on complying with the permit.

Comment 1.1.3: One commenter (002) expressed appreciation that the Department incorporating the Clean Water Act (CWA) Maximum Extent Practicable (MEP) compliance standard. This commenter recommends several edits to replace other standards such as “maximum extent possible” with the “maximum extent practicable” standard.

Response: The CWA MEP standard is used in the permit where it is appropriate. In any instance where another standard is used it is because the Department does not consider MEP to be the appropriate standard for that requirement.

Comment 1.1.4: Commenters (004,005,007) would like the Department to improve the transparency in the public engagement and comment process. They would like all stormwater related documents available for public viewing located in a centralized location.

Response: The Department has improved its transparency and engagement process for the 2022 Draft Tier I GP due to comments received for the 2020 Draft Tier I GP. All draft permits, factsheets and response to comments, when available are located on the DNREC MS4 website at <https://dnrec.alpha.delaware.gov/water/surface-water/npdes/municipal-storm-sewers/>. The top of our website now includes links for the Departments public hearing site, comment forms, public notice page and the public meetings and events calendar. Legal notices are published online and in print in the News Journal and Delaware State News. The public can also request copies of

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draft permits by a request in writing to the Department. In accordance with 40 C.F.R. §124.17 Response to comments, States are only required to issue a response to comments when a final permit is issued, and the response shall be made available to the public. The Department will be issuing the Response to Comments before a final permit is issued for the Tier I GP. In accordance with Part III.B Recordkeeping, the permittee is required to provide the public with MS4 program information, including records. These requests are available during regular business hours.

Comment 1.1.5: One commenter (003) notes that a majority of their comments are suggestions for increased consistency between the Tier I and Tier II permits, while acknowledging that there are going to be unavoidable differences between the two permits.

Response: The Department share's the commenter's view that the Tier I and Tier II permits should be as consistent with each other as possible given the constraints inherent in a tiered system. To that end the Department has reviewed the two permits extensively and revised them accordingly with the aim of increasing consistency between them.

1.2 Comments related to permit coverage (e.g., submitting NOIs, waivers, defining MS4 boundaries)

Comment 1.2.1: One commenter (003) suggested “that the language in Part I, C.2 be updated to define the coverage area, which was not incorporated into the 2022 draft. The reasoning for this suggestion is that DelDOT is a large MS4 and would therefore be ineligible to obtain coverage as written under the Phase II, Tier I General Permit.”

Response: The language in Part I. C.2. has been updated to read “The MS4 is not a large or medium MS4 as defined in 40 C.F.R. §122.26, except DelDOT. Permit language in Part I.A. also states that the Delaware Department of Transportation (DelDOT) is eligible for Phase II permit coverage. MS4 coverage areas are defined by the US Census Bureau's Urbanized Area Maps. The reference maps that cover the State of Delaware are listed under the Philadelphia PA—NJ—DE—MD can be found here: <https://www.epa.gov/npdes/urban-area-maps-mpdes-ms4-phase-ii-stormwater-permits>. MS4 jurisdictions for each permittee are their incorporated jurisdictions. In DelDOT's case, it is their Right-of-Way. DelDOT has also been specifically exempted in the language of Part I, C.2.

Comment 1.2.2: All commenters requested that the entities applicable to the General Permit be listed in the permit's cover page. They also questioned if the University of Delaware is applicable under the Tier I (existing coverage) or Tier II (new coverage) permit.

Response: The permit was updated to include a table of Tier I entities in Part I.B. The University of Delaware has had a co-permittee arrangement with the City of Newark for the past 15 years. Each have worked cooperatively to manage stormwater in the city and on UD properties. UD has submitted MS4 annual reports each year and has a fully functional stormwater management program. The Department recommends that UD seek coverage under the Tier I program but has the option to submit coverage under either Tier I or Tier II.

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Comment 1.2.3: All commenters stated that the language in the permit is not conducive for partnering, as a co-permittee should not be responsible for fulfilling the requirements of another co-permittee that has failed its obligation. It is suggested that DNREC should utilize the MOU as enforcement on the failing permittee and should not subject the non-failing permittee to the responsibilities of the failed permittee. Commenter (001) also asks that the time for NOI submission be extended to 18 months in order to allow time to negotiate MOUs.

Response: The Department recognizes that some entities may want to establish a co-permittee arrangement later in the permit cycle. The permittees can submit a revised NOI when they are ready to enter a co-permittee relationship. The Department also recognizes the significant benefits of co-permittee arrangements and encourages them. The language in the permit regarding responsibility for fulfilling permit requirements even if a co-permittee fails to meet their obligations is a requirement by regulation 40 C.F.R. §122.35 a (1)(3) that "(3) The other entity agrees to implement the control measure on the permittee's behalf. In the reports, the permittee must submit under 40 C.F.R. §122.34(d)(3), the permittee must also specify that it is relying on another entity to satisfy some of the permit obligations. If the permittee is relying on another governmental entity regulated under section 122 to satisfy all of the permit obligations, including the obligation to file periodic reports required by 40 C.F.R. §122.34(d)(3), the permittee must note that fact in its NOI, but the permittee is not required to file the periodic reports. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure (or component thereof). Therefore, EPA encourages the permittee to enter into a legally binding agreement with that entity if the permittee wants to minimize any uncertainty about compliance with the permit."

Furthermore, 40 C.F.R. §124.33 states "The small MS4 operator may file its own NOI, or the small MS4 operator and other municipalities or governmental entities may jointly submit an NOI. If the small MS4 operator wants to share responsibilities for meeting the minimum measures with other municipalities or governmental entities, the small MS4 operator must submit an NOI that describes which minimum measures it will implement and identify the entities that will implement the other minimum measures within the area served by the MS4."

An MOU is ultimately an agreement between permittees which the Department is not a party to, and therefore cannot enforce its terms. The Department is, however, required to enforce the conditions of the permit. Permittees are responsible for fulfilling permit requirements even if a co-permittee fails to meet their obligations. If this situation were to occur, the Department may work with the permittees to develop a compliance schedule or an alternative compliance plan. If a permittee suffers any damages due to another party defaulting on an MOU, it will be up to them to seek redress as the Department would have no standing in the matter. The Fact Sheet has been updated to address this potential situation.

Comment 1.2.4: Two commenters (001, 003) stated that some sections of the permit do not apply to every permittee and should be noted in the permit.

Response: The Department understands that there will be many cases, especially with non-municipal permittees, where permit conditions will not be applicable to permittees. In the past

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individual permit coverages, it has been commonly understood that some conditions, such as creating ordinances and enforcement actions are outside the legal abilities of some permittees. Under the GP we have established a standard permit condition, the Alternative Compliance Clause, to address and document these cases.

Comment 1.2.5: Commenter (006) thinks the Delaware Department of Transportation (DelDOT) needs to seek an MS4 permit in both Kent and Sussex Counties because DelDOT manages the vast majority of impervious cover from roads and all state agencies should be partnering to meet the goals in the Chesapeake Bay watershed.

Response: DelDOT within the urbanized area of Kent County is currently under an individual Phase II permit. Once the Phase II Tier I becomes effective they will transition to a general permit due to the tiered permit approach, Tier I for existing permittees and Tier II for new permittees. DelDOT will have the option to submit an NOI to include both Kent and Sussex Counties under the Tier I GP or submit an NOI to include Sussex County under the Tier II GP. Under the Phase II Tier II GP any public entity within the US Census Bureau's Urbanized Area Map based on the 2010 census will need to submit an NOI even if they were not previously identified.

1.3 Comments related to Storm Water Management and Water Quality

Comment 1.3.1: One commenter (002) provided the following: "*The SWMP Plan Requirements for Describing Pollutant Sources Should Be Streamlined*. Part I.E.,3 of the 2022 Draft mandates that a permittee's Storm Water Management Program (SWMP) plan include certain information for any receiving water receiving an MS4 discharge. 2022 Draft, p. 5. A permittee must determine whether the receiving watershed is in the State's Combined Watershed Assessment Report and, if so, provide a description of the permittee's potential sources of the relevant pollutants with any measures "that are or can reasonably be taken to reduce their exposure or release to the MS4," an "estimate of costs to implement the BMPs," and a schedule for implementing the BMPs. 2022 Draft, p. 5-6.

The City previously commented that this requirement could inappropriately be read to require that a permittee track down all sources of a particular pollutant throughout the MS4 service area, whether those sources are public or private. The City suggested revisions to limit track downs to sources owned or operated by the permittee. Unfortunately, DNREC did not adopt the City's revised text.

The requirement as written is very burdensome and would take hundreds if not thousands of staff hours to complete.² In addition, if the expectation is that the City will conduct a track-down of private sources, the City questions how it could reasonably find out from an unrelated, third-party what BMPs could be installed at its facility to address the pollutant, how much those BMPs would cost, or how quickly installation could occur. A private entity has no obligation to share this information with the City, and the City has no way to compel it.

Lastly, the City questions why gathering this detailed information is helpful before a TMDL is

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even written. A TMDL is a scientific study to determine pollutant sources. This is a new requirement that wasn't in their individual permit and is based on language from the Phase I MS4 permit. The city states this will be overly burdensome financially and on staff time.

Response: The intent of Part I Section E, Storm Water Management and Water Quality is to develop a stormwater management program that takes a risk-based prioritization of the receiving waters and focus on pollutant reduction measures for probable pollutants. Identifying the watersheds and receiving waters in a MS4 jurisdiction is a starting point for developing the priorities for addressing pollutant control strategies in the Pollutant Reduction Plans (Part II E).

The Department agrees with the commenter that tracking down all sources of pollutants to the MS4 would be costly and is not the intent of this section of the permit, nor the PRP. In the PRPs, permittees are required to choose one watershed with a TMDL and develop a PRP that addresses the TMDL requirements. Determining probable sources of pollutants is one factor used to determine higher risk areas that can be addressed first. It is not requiring that a permittee track down *all* sources of a particular pollutant throughout the MS4 service area, whether those sources are public or private. For example, probable sources of pollutants that are identified in the TMDL may come from industrial zoned areas, more densely populated areas or commercial areas that have large sources of pollutants. The identification of these areas will help to concentrate staff and material resources to the areas of higher risk. The permittee is not being asked to write a TMDL as they have already been written and are available to view at <https://dnrec.alpha.delaware.gov/watershed-stewardship/assessment/tmdls/>.

Comment 1.3.2: Another commenter (003) stated regarding Part 1.E.3 (c) that “This information is more pertinent to the Pollution Reduction Plan (PRP) and should be a requirement of that document; not the Storm Water Management Plan (SWMP). Having it included in the SWMP will result in extra expense to prepare prior to the full watershed plans being developed as part of the PRP. Instead, the permittees shall rank the watersheds per their water quality impairments and the percentage of the MS4 that resides in the watershed. This ranking will help determine which watersheds have a PRP developed first.”

Response: The Department agrees with moving an estimate of costs to implement BMPs and a schedule for implementation to the PRP section. The Department has already changed the requirement of the pollutant reduction plan to include only one watershed. Part I.E.4 requires the permittee to include for each receiving water the number of outfalls discharging to each waterbody, designated uses, whether receiving water is as impaired, if the water is impaired list the TMDL status or Pollutant classification, relevant pollutant or stressor, probable source of pollutants, summary of PCS strategies, and a description of the permittee’s potential sources. These requirements will not result in an extra expense as permittees should already have this information readily available and if not, the information is easily attainable on the Departments website and the permit includes all links to necessary information.

Comment 1.3.3: All commenters requested that we clarify the term outfalls as “known outfalls”.

Response: Unknown outfalls have the potential to carry pollutants to surface waters just the same as known outfalls, therefore they pose a potential risk and are included. It’s recognized that

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an illicit discharge from an unknown outfall cannot be known until discovered. Once an illicit discharge is reported from an unknown outfall, it should be treated in the same way as an illicit discharge from a known outfall.

Comment 1.3.4: One commenter (002) stated that the SWMP is not an enforceable document and in this section, language should be added to clarify this.

Response: The Department agrees that the contents of the Stormwater Management Plan is not an enforceable document. The language in the first paragraph has been clarified to state that the permittee will *plan*, implement, manage, and enforce their stormwater management program.

Comment 1.3.5: One commenter (002) suggests that regarding Part I.E.,3.c permittees should focus on impaired waters listed on the 303(d) list, specifically category 4, 4a, and 5 waters.

Response: The permit specifies additional requirements for receiving waters in these categories.

Comment 1.3.6: One commenter (002) requests that Part I.E.,3.c.v specify only potential sources of relevant pollutants that are owned by the permittee.

Response: The requirement asks for a description of the permittee's potential sources of relevant pollutants. All sources of pollutants are relevant to protect water quality not just the source owned by the permittee.

Comment 1.3.7: One commenter (002) suggests that the certification statement required for the SWMP Plan is inappropriate because the plan is not an enforceable document and that it is unnecessary as Part IV.P specifies signatory requirements. Commenter 003 requests removing the requirement to notify DNREC of changes of signatory individuals.

Response: Part IV.P Standard Permit Conditions are consistent with the general provisions required under 40 C.F.R. §122.41. The permittee shall sign **all** applications, reports, the SWMP plan, certifications or other information required by this permit, whether submitted to the Department or maintained by the permittee. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, the permittee must submit a new notice of intent satisfying the requirements of this paragraph to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative no later than 30 days prior to the date of the next due deliverable.

Comment 1.3.8: All commenters made suggested changes to the terms 'receiving waters', 'waterbodies' and 'watersheds' in this section.

Response: The Department has clarified the terms by defining each in Part V., and has updated Part I.E., to follow the regulations set forth in 7401 Delaware Water Quality Standards.

Comment 1.3.9: One commenter (001) stated "The concept of economic feasibility must be included throughout the Permit in the context of best management practices (BMPs). There is always the possibility of spending millions of dollars to reduce runoff by .01%, for example. But that is neither economically feasible nor reasonable (even if it is technologically possible)."

Response: As public resources to properly manage stormwater are limited, the Department

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agrees with this concept and the understands point of diminishing returns. The term Maximum Extent Practicable (MEP) is used in the permit where appropriate to address considerations of cost, feasibility, existing technology, and logistics when evaluating measures and BMPs.

Comment 1.3.10: Three commenters (002, 003, 008) requested more time between NOI submission and the submission of a revised SWMP plan. They request the time be extended from 6 months to 18 months or 12 months from the signature of a Memorandum of Understanding (MOU). The commentor also requests the requirement to submit for DNREC approval be removed.

Response: The deadline for submission of an SWMP Plan has been extended from 6 months to 12 months. If a permittee enters into an MOU with another permittee which affects their SWMP they may always submit a revised SWMP Plan and NOI accordingly. While the Department will neither approve nor reject the SWMP Plan as it is a planning document and not enforceable, the permittee is still required to submit the plan for review. The Department may make suggestions or comments upon reviewing the plan, but department approval is not a requirement.

2.0 Comments on the Stormwater Management Program

2.1 Comments on Public Education and Outreach Minimum Control Measure

Comment 2.1.1: One commenter (002) suggests replacing “continuously update” with “update as needed,” stating that continuously updating is impossible.

Response: The Department accepts this suggestion and has made the appropriate revision.

Comment 2.1.2: One commenter (002) recommends clarification that only appropriate employees are required to receive training, as opposed to ALL employees.

Response: The department has revised the permit as requested.

Comment 2.1.3: One commenter (002) requests revision to include water quality complaints relevant to the MS4, not all water quality complaints.

Response: The Department takes the position that the public may not know if a particular complaint is MS4 related or more general. Should a resident report a legitimate water quality complaint not relevant to the MS4, the Department hopes that the permittee would address such a complaint or forward the information to the appropriate agency.

Comment 2.1.4: Commenter (004) would like to establish an aggressive project implementation timeline to align with new federal infrastructure funding opportunities.

Response: Establishing an aggressive project implementation timeline to align with new federal infrastructure funding as a function of the General Permit would be inappropriate. This Tier I general permit covers several public entities all with different infrastructure needs and resources available to them. The Department does not dictate how public entities are required to spend their federal funding, nor do the federal regulations govern how they budget their capital. This general permit allows for clear, specific, and measurable terms while providing the permittee the flexibility to develop BMPs to control stormwater runoff and achieve reductions. The

Department encourages permittees to analyze information available to their specific entities to identify trends, patterns and areas of concern adjust their program to focus their resources on areas of greatest concern.

2.2 Comments on Public Involvement and Outreach Minimum Control Measure

Comment 2.2.1: Three commenters (002, 003,008) object to the MCM 2 requirement and other similar requirements that permittees “Comply with all State and Federal public notice requirements for any regulated activity associated with this permit,” stating that there are no such state or federal public notice requirements.

Response: Regardless of the existence or absence of any applicable public notice requirements, this is a requirement of any NPDES permit issued to a small MS4 dictated by 40 C.F.R. §122.34(b)(2)(I).

2.3 Comments on Illicit Discharge Detection and Elimination Minimum Control Measure

Comment 2.3.1: One commenter (003) requested clarifying language on outfall screening in Part II.3.d.2.a that will allow for the permittee to weed out highly unlikely outfalls, such as one that collects highway runoff with no adjacent residential, commercial, or industrial use.

Response: Upon review of the comments received, we have added clarifying language consistent with other MS4 permits.

Comment 2.3.2: Two commenters (001, 003) noted that as they are not municipalities, they are unable to create ordinances and conduct enforcement actions and will need to use the Alternate Compliance Clause in these situations.

Response: The Department recognizes there are situations where provisions of a general permit will not pertain to some permittees or conditions will not allow for actions such as creating ordinances and conduct enforcement actions. The Alternative Compliance Clause is the mechanism to use for these situations on a case-by-case basis.

Comment 2.3.3: Several comments were received on the procedures for recognizing and reporting sanitary sewer overflows (Part II,D.3.e.7). One commenter (002) stated that the proposed reporting requirements are overly broad and unnecessary. They reiterated their comments from the 2020 draft General Permit: “Discharges of sanitary sewage into the MS4 are illicit discharges, and the City currently handles them as such. It is unnecessary to spell out specific requirements for SSOs and OSDS leaks into the MS4. In addition, the Department is already receiving SSO reports from a wastewater plant; there is no need for double reporting, which itself raises a risk of inadvertent inconsistencies between the MS4 and wastewater reports. In Delaware, the minimum reportable quantity is 10,000 gallons, not 50, and any quantity reaching a water body or the MS4 is usually reported to the DNREC Hotline. Lastly, federal regulations do not reference SSOs or OSDS leaks at all in MCM-3. The above being said, the City is willing to report any known SSOs into the MS4 if the volume exceeds the DNREC reportable quantity of 10,000 gallons (versus the very low 50 gallons included in the GP).”

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Another commenter (003) suggested moving the timeframe from this element and associate it with the timeframe of the SWMP as the new element will take time and resources to establish. Commenter (001) requested the SSO requirements be modified to make clear that this does not apply to every permittee.

Response: Any quantity of sewage into the MS4 is an illicit pollutant discharge and should be addressed under the permittees' standard operating procedures for illicit discharges. The 2004 EPA report to Congress on CSOs and SSOs state: "When the CSO Control Policy was released, many stakeholders, key members of Congress, and EPA advocated for it to be endorsed in the Clean Water Act to ensure its full implementation. In the Consolidated Appropriations Act for Fiscal Year 2001, P.L. 106-554, Congress stated that: ...each permit, order, or decree issued pursuant to this Act after the date of enactment of this subsection for a discharge from a municipal combined storm and sanitary sewer shall conform to the CSO Control Policy signed by the Administrator on April 11, 1994. SSOs that reach waters of the United States are point source discharges, and, like other point source discharges from municipal SSSs, are prohibited unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit." While wastewater treatment plant operators have a permit requirement to report SSOs, there is no assurance that these reports are relayed to the MS4 operators unless local agreements are in place. After considering the goals of this program element – to recognize, report and minimize the discharges of SSOs to MS4s – the permit language has been clarified that reporting of all SSO and on-site sewage disposal systems (OSDS) will be defined in a standard operating procedure and recorded in the SWMP. All IDDE investigations of SSOs and OSDS made by the permittee shall be documented and reported as a summary in the Annual Report.

Comment 2.3.5: All commenters requested when referencing MS4 outfalls, the permit clarify by stating the outfalls as “known” outfalls.

Response: Unknown outfalls have the potential to carry pollutants to surface waters just as known outfalls, therefore they pose a potential risk and are included. It's recognized that an illicit discharge from an unknown outfall cannot be known until discovered. See Response to 1.3.3.

Comment 2.3.6: One commenter (001) suggests that the IDDE, MCM, and PRP all be folded into the SWMP for the sake of simplicity.

Response: Because the SWMP plan is a planning document only and therefore cannot be enforced, it is not appropriate for these elements to be left to be addressed by the SWMP alone. Compliance with these elements must be enforceable, and therefore need to be addressed as permit requirements independent of the SWMP plan.

Comment 2.3.7: One commenter (002) objects to the use of “waters of the state” in this section as that phrase includes groundwater and this permit should only relate to surface waters. Commenter 001 also notes that groundwater is outside the purview of this permit.

Response: Part II.D.3. language is a requirement of any NPDES permit issued to a small MS4 dictated by 40 C.F.R. §122.34(3)(ii). While it is recognized that managing stormwater runoff into

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the MS4 is an overarching permit requirement, polluted stormwater may impact both surface water and groundwater.

Comment 2.3.8: One commenter (002) wishes to add “irrigation water” to the list of discharge exemptions to be consistent with federal regulations.

Response: Part II.D.3. has been updated to include irrigation water in the permit.

Comment 2.3.9: One commenter (002) wishes to clarify the requirement to field verify and map conveyances, outfalls, and storm management structures. Specifically, they wish to limit the requirement to those items that are newly constructed or discovered “by the permittee” stating that they cannot map those discovered by unrelated third parties.

Response: The city’s suggested language would exempt structures, outfalls, and conveyances discovered by third parties even if the permittee became or was made aware of them. The department takes the position that knowledge of the existence of an unmapped item is the operative prerequisite for this permit condition, and that this is implied by the existing language.

Comment 2.3.10: Commenter (002) notes that written procedures are planning documents only, and not subject to DNREC review and approval.

Response: The department agrees that planning documents are not subject to the department’s approval; however, the department can and does require that such plans be developed, and therefore requires they be submitted for review in order to verify their existence.

2.4 Comments on Construction Site Stormwater Runoff Control Minimum Control Measure

Comment 2.4.1: All commenters had issue with making changes to the permit if Sediment and Stormwater or other related regulations change. One commenter (002) wrote: “**GP Requirements Cannot Change Mid-Stream.** Part II.D.4 requires that a permittee update its Construction Stormwater Management Program to address modifications or updates to state and/or federal regulations, presumably even if those changes occur during the permit cycle. 2022 Draft, p. 11. *See also* Part II.D.5 (requires that a permittee update its Post-Construction Stormwater Management Program to address changes to state and federal regulations). 2022 Draft, p. 13. The City requested that DNREC change this text in earlier comments to the 2020 Draft; DNREC did not do so. There is a fundamental legal problem here. Permittees who are faced with changes in the middle of the permit term are denied the right to public review and comment, as is the general public. 7 Del Admin. Code 7201 §6.51.6 states that only certain types of permit modifications can occur without public notice and opportunity for comment, including, for example, correction of typographical errors. DNREC should not issue the GP with the current language in place. “

Response: Commenters are effectively requesting that the Department allow a permittee to remain compliant with the conditions of the GP even if they are no longer compliant with updated state and/or federal regulations. It is the department’s position that the opportunities for public comment included in processes for amending the aforementioned state and federal

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regulations are sufficient. Further the department cannot issue a permit that allows a permittee to remain in violation of relevant state and/or federal laws and regulations.

If Delaware Administrative Code 5101, Sediment and Stormwater Regulations were to change, the MS4 Program would modify its current GP to include updated permit conditions. Since the permittee or Delegated Agency would need to follow these regulations to remain in compliance with Title 7 Delaware Code Chapter 40 the permittee should already be executing said requirements and if not, they would be out of compliance with both NPDES permits. In accordance with 40 C.F.R. §270.41 Modification of permits, Part IV. M. Permit Modification, Revocation and Reissuance and Termination.

Comment 2.4.2: One commenter (001) notes that not all permittees have the capacity to implement construction stormwater permitting programs.

Response: This is a scenario where use of the Alternative Compliance Clause is appropriate.

Comment 2.4.3: One commenter (002) objects to language requiring CCR training of site contractors. The commenter notes that CCR training is provided by the state, and questions how a permittee can know training has occurred or that CCRs are on site “during critical stages of BMP construction.”

Response: DNREC Sediment and Stormwater does not require contractors to have CCR certification. They require responsible personnel on site to have at least one individual who is on site daily to have completed the Contractor Training Program (CTP). The CCR conducts weekly site inspections and is provided with oversight by a Delaware Professional Engineer. CCRs are required to be third party individuals, meaning the site contractor cannot fulfill CCR construction review responsibilities for their own sites. The alternative compliance clause exists for permittees who lack the jurisdictional authority to impose such a requirement.

Comment 2.4.4: Two commenters (002,008) object to being required to summarize CCR training in the annual report, stating the department should already have this information as CCR training is provided at the state level.

Response: Individual trainees may move to a different position or employer; therefore, the state’s records may be incomplete, and thus the state’s records may not accurately reflect the training status of the permittee’s employees. Further, requiring the summary in the annual report encourages permittees to be cognizant of the training status of their workforce.

Comment 2.4.5: One commenter (002) wishes to limit procedures for receipt and consideration of information submitted by the public to information relating to stormwater control measures on active, regulated construction sites.

Response: The permittee cannot determine if information relates to stormwater control measures on active regulated construction sites until after they have received and considered it.

Comment 2.4.6: Commenter 002 questions the reasoning behind requiring construction site inspections presented as percentages rather than total numbers and objects to this requirement.

Response: DNREC S&S regulations require regular basis construction reviews. Not all sites are created equal and depending on the stage of construction, weekly reviews may be necessary or monthly or less frequent may be required. DNREC S&S requires CCRs on all sites for a weekly review. The volume of construction activity overseen will vary among permittees. Viewing inspection activity as percentages helps to compare inspection programs for permittees who may have different numbers of construction sites within their jurisdictions.

2.5 Comments on Post Construction Stormwater Management Minimum Control Measure

Comment 2.5.1: One commenter (002) objected to the requirement that stormwater management systems be inspected “in such a manner as to ensure proper function,” because the permittee cannot “ensure” the proper function of a privately owned system. The commenter suggested changing the language to instead require determining whether the systems are functioning properly.

Response: While a permittee may not be able to perform maintenance or repairs on a malfunctioning privately owned stormwater management system, they can require that the owner do so either by their own authority or through cooperation with the appropriate delegated agency. Such an enforcement action would satisfy the requirement of ensuring proper function of the stormwater management system.

Comment 2.5.2: One commenter (002) cites a perceived discrepancy between the requirement that all stormwater systems be visually inspected each year and the immediately following requirement that a representative sample be inspected in such a manner as to ensure proper function.

Response: The more stringent second requirement takes the place of an earlier iteration requiring 10% of systems be inspected after multiple wet weather days. The updated requirement grants permittees more flexibility in determining how many stormwater systems to inspect in any given year, as well as allowing the permittee to use indirect methods of observation should wet weather monitoring prove impractical or impossible. Thus, every stormwater management system receives at least a cursory visual inspection once a year and a more comprehensive inspection of function once every permit term.

Comment 2.5.3: Two commenters (002, 008) state that because a majority of the section refers to Sediment and Stormwater regulations it would be simpler to state that satisfactory completion of Delegated Agency duties indicates compliance with this section.

Response: A comprehensive general permit should include all required permit terms and conditions in accordance with C.F.R. §122.28(d)(1). Under §122.34 the permit terms must be clear, specific, and measurable to satisfy the requirements of the Clean Water Act and ensure that the permittee implements the minimum control measures. MCM 4 and MCM 5 have been outlined for specific permit requirements due to the fact this is a general permit. A general permit will cover many permittees, and some are their own delegated agency where others have entered an MOU with one. The Department will retain these sections as they are.

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Comment 2.5.4 One commenter (001) states that Part II Section D (5) should include cross references to local or state laws or regulations.

Response: Title 7 Delaware Code Chapter 40 is referenced in this section.

Comment 2.5.5: One commenter (002) objects to the mapping requirement stormwater management systems “which may discharge to the MS4,” preferring instead that the requirement only apply to stormwater management systems that drain to the permittee’s MS4.

Response: Accurate knowledge of all stormwater systems that have the potential to discharge to the permittee’s MS4 can be critical in identifying the source of an illicit discharge. A stormwater management system that may discharge to the MS4 should therefore be mapped even if it is not currently discharging into it.

Comment 2.5.6: One commenter (002) suggests limiting visual inspection requirements to the MS4 permit area, which may be different than a permittee’s jurisdictional boundary.

Response: The permittee is only responsible for inspection requirements within their MS4. This includes the Census Bureau’s Urbanized Areas based off the 2010 census. If areas of a municipality are outside of the urbanized area, then they would not be covered under the NPDES MS4 program.

2.6 Comments on Pollution Prevention and Good Housekeeping Minimum Control Measure

Comment 2.6.1: One commenter (002) objected to elements of the is MCM stating the following: “**The GP Should Not Include Phase I MS4 Good Housekeeping Requirements.** The City continues to object to requirements in Minimum Control Measure (MCM) 6 that go beyond Phase II MS4 requirements. Typically, small MS4 permittees are expected to perform training and have procedures for reducing pollutants from their own activities on certain municipal sites. However, PHF (pesticide, herbicide, and fertilizer) and snow and ice programs are limited to Phase I MS4 permittees by federal regulation. The GP should not include Phase I MS4 requirements; the text should be deleted.” Other commenters (001, 003) also requested these be deleted from the permit without providing a reason.

Response: The MS4 Phase II individual permits have always included requirements for these potential pollutants and MS4 operators have reported on their activities in Annual Reports for the past 15 years. Some MS4 operators have highlighted the importance of this and have highlighted their achievements. Removing these elements from the GP would be considered backsliding under the CWA Anti-Backsliding provision. Reference regulations and guidance on dealing with pesticides reference EPA guidance (ACWA guide 2018) The 2003 individual MS4 permits state "The program must at a minimum, include the following: a. An employee training program; b. Maintenance activities and procedures or pollution prevention measures to prevent or limit discharges of pollutants associated with the following: open space, park and recreational area maintenance, roadside vegetation management, fleet and building maintenance, equipment and vehicle washing, de-icing material storage" It is also required under the City of Newark’s individual permits in MCM 1 Education and Outreach: "The permittee's education and outreach

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efforts shall address the following: a. Activities that occur at City of Newark facilities, any BMPs employed and any pollution prevention efforts at those facilities; b. Residential activities; c. illegal dumping into storm drains; and d. The proper disposal of litter, pet waste, used oil and household hazardous wastes; **the proper use and disposal of fertilizer and pesticides** and the impact of impervious areas on neighboring water bodies."

Comment 2.6.2: Commenter 001 requests the inclusion of a check list or outline of required SWMP components.

Response: For the permittees' convenience the Department has provided a milestone schedule as an appendix to the general permit that includes deadlines for SWMP components and other permit time requirements. Milestone chart does not include all permit elements, for compliance see general permit conditions.

Comment 2.6.3: One commenter (002) wishes to exempt facilities already covered by a permit authorizing the stormwater discharges associated with industrial activity from the requirement to maintain or updated a good housekeeping plan. They state that requiring the permittee to abide by both the industrial stormwater permit and the good housekeeping MCM of this permit puts the permittee at risk of double jeopardy.

Response: The language of this permit does not prevent the permittee from using a single SWP to conform to both permits.

Comment 2.6.4: One commenter (003) requests adding an "or" in the street sweeping requirement between the science-based requirement and the need to sweep a minimum of 4 times a year on curbed streets.

Response: The requirements already accurately describe the circumstances under which 4x/year is not required.

Comment 2.6.5: Commenters (004,007) would like the Department to provide guidance on acceptable BMPs with attention to holistic benefits and climate resilience.

Response: This general permit allows for clear, specific, and measurable terms while providing the permittee the flexibility to develop BMPs to control stormwater runoff and achieve reductions. While the Department does not believe the MS4 General Permit Program is the appropriate venue for promoting specific practices, it does make information on the relative merits and various stormwater management practices, including holistic benefits and climate resilience, available through several other programs. Part II.D.6. of the permit under Pollution Prevention and Good Housekeeping states it's the permittees discretion to consider incorporating green infrastructure in the routine upgrade of existing systems but the decision would be the permittees and would not be a permit violation.

2.7 Comments on the Pollution Reduction Plan

Comment 2.7.1: One commenter (002) requested adding a phrase that permittees should choose a TMDL that lists the MS4 as a source with a WLA. They object to an impression that a

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permittee is required to draft a PRP without regard to whether their MS4 has been listed in the TMDL as a source of the pollutant of concern.

Response: During the development of Delaware's TMDLs, all loads generated within a watershed were accounted for in the TMDL analyses. Limits for loads from point sources and other regulated discharges which existed at the time of the TMDL analyses are identified by waste load allocation (WLA) in the TMDL. Because many TMDLs were developed before more stringent regulations were established, or before specific MS4 areas were identified, loads generated from MS4 areas were accounted as part of the nonpoint source load and were given a limit under the load allocation (LA). So, while the loads generated from MS4/municipalities may not be specified in the analyses as a regulated discharge and were not placed under the WLA category, they were still accounted for as part of the nonpoint source load. For these watersheds, when a new MS4 area is identified, the loads for the newly identified MS4 area will be examined.

The High Flow TMDL analysis for the Christina River Basin has MS4s documented since they were in place at the time of the analysis, so for this basin-wide analysis the Newark MS4 was identified as part of the WLA, and details are broken down further into the associated municipalities within the sub-watersheds.

If the nonpoint source percent reductions developed through the TMDL analysis process are used, they should be appropriate to apply to areas that have newly proposed MS4s. These percent reductions are documented in state regulation or in the TMDL analysis document in the case of EPA developed TMDLs.

TMDL analyses are not usually reviewed or updated unless implementations goals have been achieved or significant changes in loads have been identified. In Delaware, TMDLs have not been reviewed or updated based on the designation of a new MS4 within a watershed, rather the loads and reductions for the new MS4 are evaluated and established based on the existing TMDL regulation established in through TMDL analyses. This is the approach for most watersheds in the state which have both a DNREC established TMDL analysis and an adopted regulation. There are several exceptions to this process, where there is an EPA developed a TMDL analysis document and associated TMDL, but no state TMDL regulation was established. In this situation, the specifics shall be assessed based on the analysis document.

In the case of TMDL regulations, analyses were conducted on a set of baseline years to establish a load representative of average conditions. Understanding that baseline loads can vary greatly depending on the specific years of data used to calculate the baseline, a percent reduction was calculated as part of the analyses and this information was used to formulate "percent reductions" into state regulation. The benefit of using percent reductions vs a specific load calculation allows for the percent reduction required under average conditions to be used to calculate future reductions as well. It is impractical to establish new TMDLs or modify existing TMDLs every time a load is modified due to changes in other regulations or policies. In watersheds which have established state regulations and MS4s were not considered at the time of

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the TMDL analysis, all of the area loads not identified as point source waste load allocations would have been calculated as part of the nonpoint source load allocation (LA).

Comment 2.7.2: One commenter (002) objects to the requirement that permittees provide “calculated load reductions achieved by each BMP” because BMP design is based on assumed efficiencies for specific practices. The commentor favors a requirement to provide “estimated” reductions based on established efficiencies.

Response: This requirement has been clarified in the permit to allow estimates based on available technical data.

Comment 2.7.3: One commenter (002) suggests including “These TMDLs may assign specific numeric Waste Load Allocations (WLAs) to dischargers located within the MS4 area.”

Response: Revised as suggested.

Comment 2.7.4: One commenter (002) requests the requirement to “prevent” pollutants of concern be changed to “reduce pollutants of concern to the maximum extent practicable.”

Response: This language refers to the design of BMPs and not to a requirement on the part of the permittee to prevent the discharge of pollutants. The term MEP is not appropriate in describing the design of a BMP.

Comment 2.7.5: Commenter (006) acknowledges the nutrient banking, offsets and trading program is still in development but would like the Department to make this process as transparent as possible. They feel the program should be initiated only after more public discussion about and only as a pilot to allow further adjustments based on lessons learned from implementation.

Response: Currently, a nutrient banking, offsets and trading program is still in the development phase, but once established, trading with other sectors may be considered as an alternative method to achieve pollutant reductions. There is a pilot project coordinated by The Water Fund with the City of Newark and farmlands in Pennsylvania. DNREC and PA DEP are monitoring and will evaluate the results at the end of the 5-year project. Learn more here:

<https://www.i2capitalcorp.com/revolving-funds/water>

The MS4 program will work with our permittees and their PRP once more detailed information becomes available.

Comment 2.7.6: Commenters (004,005,006,007) would like the PRP Section (E-1) to articulate long-term goals, baseline, and benchmarks for the reduction of municipal stormwater pollution and the attainment of water quality standards. They feel there needs to be baseline loads estimated for all pollutants identified in any TMDLs, and the load reductions should be presented as real quantities (pounds of sediment) rather than a generalized percent.

Response: The flexible approach of the general permit allows the permittees time to develop appropriate Pollutant Reduction Plans for their respective watershed and meet their water quality requirements. For TMDLs throughout the state where loads are assigned specific to urban stormwater the permittee shall be responsible for addressing reductions required by the TMDL.

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They shall establish reductions over iterative stages of a long-term program which will be outlined in the PRP. This planning document will guide the selection and implementation of specific BMPs to reduce pollutant loading to surface waters. The permit does not contain numeric effluent limits or benchmark monitoring but requires the identification of TMDLs and the pollutants of concern. The permittee will identify targeted controls, BMPs or other Department approved methods to address these pollutants. Partnerships may be utilized to help address impaired waters and TMDLs.

3.0 Comments on Program Evaluation and Assessment, Recordkeeping, Reporting and Program Review

3.1 Comments on program evaluation

Comment 3.1.1: One commenter (002) is concerned about language requiring MS4 program information be available to the public during regular business hours, stating that some information should not be released to the public.

Response: Section 308 of the Clean Water Act dictates what records are required to be available to the public and what can be withheld. The permit only requires permittees to make available the records dictated by federal law and cannot require less.

Comment 3.1.2: One commenter (003) suggests removing the Recordkeeping section and retaining the Retention of Records section, citing redundancy and inconsistencies between the two sections.

Response: These sections are standard permit conditions of NPDES permits.

4.0 Comments on Standard Permit Conditions and Definitions

4.1 Comments on program evaluation

Comment 4.1.1: One Commenter (001) is concerned about ambiguity and discretion in the permit. They state that permittees should be afforded the opportunity to correct mistakes before the declaration of a violation.

Response: Alerting permittees to incidents of non-compliance and recommending corrective action is the major function of the Department's review of annual reports. Further, the language included in the Alternative Compliance Clause offers permittees additional opportunities to avoid being in violation of the permit.

Comment 4.1.2: One commenter (003) requests additional language be included to protect permittees who are following an approved alternative compliance request.

Response: The Department considers the Alternative Compliance clause itself to be sufficient language to achieve this goal.

4.2 Definitions: All commenters noted that the terms/acronyms 'stormwater' and 'Pollutant Reduction Plan/PRP' need to be used consistently throughout the permit. Also, commenters 002

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and 003 request a definition be provided for the term 'dry weather.' Commenter 003 also requests that the definition of 'watershed' in the PRP section be clarified.

Response: Appropriate additions, clarifications, and corrections have been made.