Statement of Basis for Proposed Permit Modification:

NPDES General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) to Certain Waters in the State of New Hampshire

In consultation with various parties, EPA is proposing to make the following modifications to the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges from small Municipal Separate Storm Sewer Systems (MS4s) to certain waters in the State of New Hampshire (New Hampshire Small MS4 General Permit).

EPA has received input during settlement negotiations arising from litigation brought by the multiple parties challenging this permit (and the Massachusetts Small MS4 General Permit).[1] It is EPA's view that the proposed modifications are consistent with the Clean Water Act (CWA) and 40 C.F.R. § 122, including 40 C.F.R. § 122.62, and based on the causes for modification specified in 40 C.F.R. § 122.62(a), including section 122.62(a)(2).

These proposed modifications would be consistent with the CWA and implementing regulations. A comprehensive summary of the basis of all permit conditions, including all applicable statutory and regulatory authorities, is included in the original New Hampshire Small MS4 General Permit fact sheet,[2] the statement of basis for the 2015 renotice of certain draft

[1] *Center for Regulatory Reasonableness et. al v. EPA*, *Conservation Law Foundation, Intervenor* No. 17-1060 (D.C. Circuit) (2017 New Hampshire Small MS4 General Permit D.C. Circuit Petition); *Center for Regulatory Reasonableness, et al. v. EPA*, No. 16-1246 (D.C. Circuit) (2016 Massachusetts Small MS4 General Permit consolidated cases).

[2] "Fact Sheet: Draft General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in New Hampshire," February 12, 2013. *Available at* https://www3.epa.gov/region1/npdes/stormwater/nh/2013/NHMS4-FactSheet-2013-WithAttachments.pdf.

permit sections,[3] the responses to comments for the final permit,[4] and as described below. Any proposed modifications relating to 40 C.F.R. § 122.34 reflect the requirements of that regulatory section as revised by EPA in January 2017.

In accordance with 40 C.F.R. § 122.62, EPA is only reopening for public comment the conditions subject to these proposed modifications in the Final 2017 New Hampshire Small MS4 General Permit. The proposed modifications also include corrections of typographical errors and omissions throughout. These modifications were done in accordance with 40 CFR §122.63. All persons, including permittees, who believe any of these proposed permit modifications are inappropriate must raise all issues and submit all available arguments and all supporting material for their arguments in full by the close of the public comment period, to Suzanne Warner, U.S. EPA, Water Division, Stormwater and Construction Permits Section, 5 Post Office Square, Suite 100, Boston, Massachusetts 02109-3912 or warner.suzanne@epa.gov. Any person, prior to such date, may submit a request in writing for a public hearing to consider the Draft Permit to EPA. Such requests shall state the nature of the issues proposed to be raised in the hearing. A public hearing may be held if the criteria stated in 40 C.F.R. § 124.12 are satisfied. In reaching a final decision on the Draft Permit, the EPA will respond to all significant comments and make these responses available to the public at EPA's Boston office and online.

[3] "Statement of Basis for Proposed Modifications Section 2.1.1, 2.2 (including all subsections), and 2.3.6. (including all subsections), Appendix F (excluding attachments) and Appendix H (excluding attachments) of the Draft General Permits for Stormwater Discharges form Small Municipal Separate Storm Sewer Systems in New Hampshire", September 1, 2015. *Available at* https://www3.epa.gov/region1/npdes/stormwater/nh/nhms4-renotice-statement-of-basis.pdf.

[4] "EPA Response to Comments on the National Pollutant Discharge Elimination System (NPDES) General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in New Hampshire," January 18, 2017. *Available at* https://www3.epa.gov/region1/npdes/stormwater/nh/2017-response-to-comments-sms4-nh.pdf.

Following the close of the comment period, and after any public hearing(s), if any such hearing(s) is (are) held, the EPA will issue a final permit decision and forward a copy of the final decision to the permittees and each person who has submitted written comments or requested notice. Under section 509(b) of the Clean Water Act, judicial review of any modification of the final general permit can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit modification is considered issued. Under section 509(b)(2) of the Clean Water Act, the requirements in this permit may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, this permit may not be challenged in other agency proceedings.

EPA may not issue a permit unless the New Hampshire Department of Environmental Services (NH DES) either certifies that the permit conditions are stringent enough to assure that the discharge will not cause the receiving water to exceed state water quality standards or it is deemed that the state has waived its right to such certification. Regulations governing state certification are set forth in 40 CFR § 124.53 and §124.55. EPA has requested permit certification by the State pursuant to 40 CFR § 124.53 and expects that the State will certify the draft permit.

Part 1.3

EPA is not proposing to modify this permit Part. That said, EPA includes it here to note that certain infiltration practices that may be used for permit compliance may be classified as Class V Underground Injection Control (UIC) Wells and subject to N.H. Code Admin. R. Part Env-Wq 404. In general, these circumstances will be limited to certain subsurface infiltration practices, such as dry wells. When an infiltration practice is considered a Class V UIC Well, the

party installing the infiltration practice will need to register the well with NHDES, per New Hampshire law. NH DES provides guidance on registering stormwater infiltration practices on their website at https://www.des.nh.gov/organization/divisions/water/dwgb/dwspp/gw_discharge/permit_stormwater_reg.htm. For additional information regarding UIC Well registration, please contact the NH DES Groundwater Discharge Program.

Part 2.0

EPA proposes slight modifications to Part 2.0 to clarify that it is the foundation for the subsequent water quality-based effluent limitations (WQBELs) in Part 2.1.1 but is not grounds for a separate permit violation.

Part 2.1

EPA proposes to replace "this permit includes provisions to ensure that discharges from the permittee's small MS4 do not cause or contribute to an exceedance of water quality standards, in addition to requirements to reduce the discharge of pollutants to the maximum extent practicable" with "this permit includes provisions to ensure that discharges from the permittee's small MS4 meet applicable water quality standards as set forth in Part 2.1.1. below." The proposed modified Part 2.1 would set up the specific WQBELs in Part 2.1.1 and would not be grounds for a separate permit violation. CWA section 402(p)(3)(B)(iii) and 40 C.F.R. § 122.34(a) authorize including these permit requirements

EPA also proposes to delete explanatory language related to the permit structure in the following sentences: "The requirements found in this Part and Part 2.2 constitute the water

quality based effluent limits of this permit. Requirements to reduce the discharge of pollutants to the maximum extent practicable are set forth in Part 2."

Part 2.1.1

EPA is proposing various modifications to Part 2.1.1. consistent with the modification EPA is proposing for Part 2.0 above.

EPA also proposes including a footnote to clarify the meaning of "applicable water quality standards" for the purposes of this permit. The footnote would clarify that applicable water quality standards are the state standards that have been federally approved or promulgated as of the effective date of this permit. EPA has compiled those standards at http://www.epa.gov/waterscience/standards/wqslibrary/.

EPA would specify, as it did with the requirements of the 2017 permit, that permittees meet appropriate water quality standards by complying with Part 2.1.1.b (and Appendix F) or 2.1.1.c (and Appendix H), as appropriate. For requirements to meet water quality standards that are not covered by Parts 2.1.1.b or 2.1.1.c, compliance would be determined instream after mixing, as applicable.

EPA proposes to require that upon notice from EPA of any other discharge of a pollutant that: (i) is not addressed by Part 2.1.1.b, Part 2.1.1.c, Part 2.2.1, and/or Part 2.2.2, (ii) is not the result of an illicit discharge subject to Part 2.3.4, and (iii) does not meet applicable water quality standards, either independently or in conjunction with other discharges, shall comply with Part 2.1.1.d. Part 2.1.1.d would require the permittee to address such discharges within 60 days or establish a schedule of actions to achieve a remedy or elimination of the discharge in the shortest time that is not impracticable.

EPA proposes to clarify this Part to make clear that an MS4's compliance with this Part would be judged solely by its compliance with relevant permit requirements. Thus, for Parts 2.1.1.b and 2.1.1.c, EPA would judge compliance based upon the requirements contained in Appendices F and H, respectively. As such, a permittee's non-compliance with Appendices F and H would constitute non-compliance with 2.1.1.a., and such non-compliance would not also constitute an additional or separate violation of the permit's WQBELs.

Compliance with Part 2.1.1.d would be judged by whether the permittee complies with the text of 2.1.1.d itself, which would specify what a permittee must do if EPA notifies the permittee that its discharge exceeds applicable water quality standards in the receiving water after any applicable mixing and the discharge of that pollutant is not subject to Part 2.2.1, Part 2.2.2 and/or Part 2.3.4. EPA does not expect the scenario described above, which would result in a discharge of a pollutant being subject to Part 2.1.1.d, to arise often (if ever), but would include this provision as a reasonable approach for the permittee to take to address any such discharge.

All modified provisions in this Part would be authorized by CWA section 402(p)(3)(B)(iii) and 40 C.F.R. § 122.34(a).

Part 2.1.2

Stakeholders requested that EPA clarify Part 2.1.2. EPA is proposing to modify Part 2.1.2.a to clarify that if an applicable NH DES approval specifies conditions or requirements related to the increased discharge, such conditions may be independently enforceable under state law and may be adopted into a future permit. For discharges subject to Part 2.1.2.a, please see NH DES guidance: https://www4.des.state.nh.us/nh-ms4/wp-content/uploads/2017/05/20171127-NHDES-MS4-Guidance-REVIEW-DRAFT.pdf. EPA is not

proposing to modify Part 2.1.2.b. For discharges to impaired waters, permit Part 2.1.2.b contemplates area-wide pollutant reductions for compliance.

Part 2.2

EPA is proposing to modify this Part to make it explicit that dischargers to certain water quality-limited waters shall be subject to the applicable requirements in Part 2.2.1, Appendix F, or an approved alternative structural control implementation schedule, and/or the applicable requirements in Part 2.2.2 or Appendix H. These proposed modifications would account for the proposed new concept of alternative structural control implementation schedules, explained in the Appendix F portion of this Statement of Basis. Permittees may implement TMDL requirements in the permit as part of an integrated plan.

Part 2.2.2

EPA proposes targeted modifications to this Part, which requires permittees to take certain actions if they discharge into certain water quality-limited waters.

First, EPA proposes to clarify that if there is a discharge from the MS4 to a water quality limited waterbody where pollutants typically found in stormwater (specifically nutrients (Total Nitrogen or Total Phosphorus), solids (TSS or Turbidity), bacteria/pathogens (E. Coli, Enterococcus or Fecal Coliform), chloride (Chloride), metals (Cadmium, Copper, Iron, Lead or Zinc) and oil and grease (Petroleum Hydrocarbons or Oil and Grease)) are the cause of the impairment and is not subject to Part 2.1.1.b for those pollutants or the MS4 is located in a town listed in Part 2.2.2.a.-b, the permittee shall comply with the provisions in Appendix H applicable to it.

Second, EPA proposes to add the following language to this Part in order to clarify that permittees' discharges may become subject to Appendix H requirements during the permit term under certain circumstances: "Permittees notified by EPA during the permit term that they are discharging to a water quality limited water shall update their SWMP in accordance with Appendix H." The deadlines for doing so are described in the modifications to Appendix H and the section of this statement of basis describing those modifications, below.

Finally, EPA is proposing to specify that Part 2.2.2 and Appendix H apply where no approved TMDL has been established "as of the issuance date of this permit." For this purpose, "the issuance date of this permit" means the date that the permit was originally issued, that is, January 18, 2017.

Part 2.3.3

EPA is proposing to modify permit Part 2.3.3.a as follows, adding the underlined language: "All public involvement activities shall comply with state public notice requirements (NH: RSA Chapter 91-A). The SWMP, all documents submitted to EPA in accordance with Appendix F, and all annual reports shall be available to the public." These proposed modifications would further EPA's goal of making all documents submitted to EPA under the proposed Alternative Schedule Request mechanism in Appendix F available to the public.

Part 2.3.5

EPA is proposing to modify Part 2.3.5 to more clearly organize the permit requirements for construction activity. In this proposal, EPA has rewritten and reorganized many of this Part's

provisions to clearly delineate permittees' responsibilities. The substantive requirements of this Part have not been changed.

As proposed, this Part would clarify that permittees may rely on Stormwater Pollution Prevention Plans (SWPPPs) prepared by construction operators developed in accordance with EPA's 2017 Construction General Permit as part of the actions necessary to meet the requirements of Part 2.3.5, so long as those SWPPPs also meet local requirements.

EPA is proposing to define the term "infeasible" in Appendix A and uses "infeasible" in this Part to clarify when Low Impact Development (LID) strategies should be incorporated into site plans. This definition is from 40 C.F.R. § 450.11(b), the Construction and Development Effluent Limitations Guidelines and New Source Performance Standards. While small MS4s are not subject to 40 C.F.R. § 450, the definition of "infeasible" in the Construction and Development Effluent Limitations Guideline and New Source Performance Standards is suitable for the Construction Site Stormwater Control Minimum Control Measure in this Permit, due to the similar nature of the discharges and for consistency with EPA's 2017 Construction General Permit.

EPA also proposes to add dates for all manuals referenced in this Part and elsewhere in the permit.

Part 2.3.6.a

EPA is proposing to reorganize and modify Part 2.3.6.a to remove references to parts of New Hampshire's Alteration of Terrain (AOT) regulations and EPA-derived pollution removal requirements, and instead specify that permittees shall adopt ordinances that include requirements at least as stringent as certain elements of the Southeast Watershed Alliance model

stormwater standards (SWA model standards). The SWA model standards can be found here: https://www.des.nh.gov/repp/documents/stormwater-ord.pdf (retrieved June 26, 2019). The SWA model standards, published in 2012, were developed through collaboration between technical experts, professional planners, and local stakeholders for coastal communities in New Hampshire. The SWA model standards lay out minimum stormwater requirements that permittees can adopt. According to the 2018 State of Our Estuaries Report by the Piscataqua Region Estuaries Partnership (PREP) (https://www.stateofourestuaries.org/2018-reports/sooe-full-report/, retrieved June 26, 2019), eight communities within Great Bay Watershed have adopted the SWA model standards, seven communities are in the process of adoption of the SWA model standards, and five communities have partially adopted the SWA model standards for post construction stormwater management.

The proposed modification recommends that permittees consider all elements of the SWA model standards when updating their stormwater bylaws or ordinances, and requires that the permittee's ordinance include elements at least as stringent as the following SWA model standard elements to address the discharge of pollutants from development sites:

1. Section 4 Element C.1: Performance Specifications for structural best management practices.
2. Section 4 Element C.3.b: Low Impact Development (LID) site planning and design requirements.
3. Section 4 Element C.3.e: Salt storage requirements.
4. Section 4 Element C.3.h: Pollution removal requirements. (explained further below)
5. Section 4 Element D: Re-development requirements

Specifically, Section 4, Element C.3.h of the SWA model standards – requiring that post construction stormwater be treated to remove 80% of total suspended solids (TSS) and at least 50% removal of both total nitrogen and total phosphorus – would apply to the various coastal and Great Bay Watershed communities specified in Section 2.3.6.a.i. All other New Hampshire permittees are not required to include the requirement to remove nitrogen in their post construction bylaw or ordinance.

The proposed modification would simplify permit Part 2.3.6.a by referencing the SWA model standards in place of the requirements for performance specifications, use of low impact development, and salt management that were listed in the Final 2017 Small MS4 General Permit. Given the continued adoption of the SWA model standards in New Hampshire, the proposed modification would allow a consistent approach to stormwater management throughout New Hampshire. With the comprehensive nature of the SWA model standards and its uniform adoption across New Hampshire, the proposed modification should result in greater pollutant reductions in post construction stormwater than the requirements contained in the Final 2017 Small MS4 General Permit. EPA specifically requests comments on whether this proposed approach represents reducing post-construction stormwater discharges to the Maximum Extent Practicable or if there are other standards that EPA should adopt to represent the Maximum Extent Practicable standard for New Hampshire communities.

The proposed modification to rely on the SWA model standards would allow permittees to choose whether to include offsite mitigation to meet the pollution removal requirements for new development, re-development, or both when developing their post construction bylaws or ordinances. The decision would be left to the permittee and not required nor prohibited in the

proposed modification and should be consistent with the recommendations of the SWA model standards.

EPA is also proposing to modify Appendix A to include the definitions of new and re-development that are used in the SWA model standards.

Part 2.3.7

Consistent with the proposed modification to Part 2.0 above, EPA proposes to replace "includes provisions to ensure that discharges from the permittee's small MS4 do not cause or contribute to an exceedance of water quality standards, in addition to requirements to reduce the discharge of pollutants to the maximum extent practicable" with "this permit includes provisions to ensure that discharges from the permittee's small MS4 meet applicable water quality standards."

Part 3.0

EPA may modify Part 3.0 based on the New Hampshire Department of Environmental Services' CWA section 401 certification. EPA is also proposing to delete Part 3.1.3. This section cross-references Part 2.3.6, which EPA is proposing to modify removing references to the New Hampshire alteration of terrain regulations. For clarity and consistency, EPA is also proposing to delete Part 3.1.3 because of its references to the alteration of terrain regulations.

Part 4.1

EPA is proposing to clarify that EPA may request specific changes to the SWMP based on annual report review as needed to satisfy the conditions of the permit. Once the permit is

issued, EPA may not require additional actions or measures not already required by the permit but may request that permittees change their SWMP to ensure that they are satisfying the conditions of the permit. EPA is also proposing to specify that only EPA, which solely issues the permit, and not NHDES, may make these requests.

Appendix A

EPA is proposing to add the term "infeasible" as defined at 40 CFR § 450.11(b):

Infeasible **-** not technologically possible, or not economically practicable and achievable in light of best industry practices.

Consistent with the proposed modification of 2.3.6.a, EPA is proposing to modify the definitions of New and Redevelopment as they apply to permit Part 2.3.6 to be consistent with the definitions used in the Southeast Watershed Alliance model standards:

New Development - for the purposes of Part 2.3.6, any construction, land alteration, or improvement of a site or structure with less than 40 percent existing impervious surface, calculated by dividing the total existing impervious surface by the size of the parcel and convert to a percentage.

Redevelopment – for the purposes of Part 2.3.6, any construction, land alteration, or improvement of a site with existing man-made land alterations. A site is considered a redevelopment if it has 40 percent or more of existing impervious surface, calculated by dividing the total existing impervious surface by the size of the parcel and convert to a percentage.

Appendix F

EPA is proposing to modify Appendix F Part III.1 to allow permittees to submit information to EPA to request an alternative schedule to meet the phosphorus reduction requirements for permittees subject to Appendix F Part III.1. in circumstances that warrant a schedule change. While the schedules to meet phosphorus reductions contained in the original Permit are assumed to represent a schedule achievable by all permittees, EPA has become aware that there may be extenuating circumstances that make meeting the schedules in Appendix F Part III.1 impracticable, even when the permittee is working to meet the original phosphorus reduction milestones. The process to change the compliance schedules in Appendix F Part III.1 is laid out in the proposed permit modification and begins with the permittee submitting an Alternative Schedule Request (ASR) package. The proposed modification would only allow for the ASR to include an alternative schedule to meet the milestones of Appendix F Table 3 item numbers 12, 14, 16, and 18. The proposed modification requires that the submittal include information on permittee's Lake Phosphorus Control Plan (LPCP) implementation to date in, a narrative of the reasons an alternative schedule is being sought, including information demonstrating the applicant's efforts and extent of progress made to meet the applicable phosphorus reduction milestones, detailed cost information for planned structural controls to meet the phosphorus reduction milestones on the requested schedule, a detailed affordability analysis including information related to funding mechanisms, a requested schedule to meet all phosphorus reduction milestones, information on any other conditions concerning capital improvement project scaling, permitting and land acquisition impediments and other practicability information supporting the need for an alternative schedule. The term "impracticable" would be interpreted based on the required information to be submitted with the ASR package. EPA expects that the need to submit an ASR will happen rarely, however, EPA

would evaluate each request when local circumstances warrant extended schedules to meet applicable phosphorus reduction requirements. An ASR would need to include an affordability assessment and planning document, describing, in detail, the reasons an alternative schedule is warranted and include a plan to meet the phosphorus reduction requirements applicable to the permittee. ASRs seeking an alternative schedule to meet the requirement of Table 3 item number 12 should only be submitted when meeting the Table 3 item number 12 milestone is unaffordable.

The proposed modification would require that when an Alternative Schedule Request package is submitted to EPA the permittee must make all documents available to the public utilizing their website, another website or other means consistent with the proposed modification to Part 2.3.3. EPA would also notify a list of interested parties via email upon the receipt of any Alternative Schedule Request package.

Under the proposed permit modifications, EPA would review the ASR package for completeness and may request more information from the permittee in order to determine that the request is complete. If EPA were to not act to determine that the ASR package is complete within 30 days of receipt or did not request additional information within 30 days of receipt, the ASR would be deemed complete. If EPA were to find the ASR to be complete (or automatically deemed complete), EPA would post the ASR package on its website for 30 days and take public comment on the ASR.

Following the 30-day public comment period, EPA would take action in writing approving or denying an Alternative Schedule to meet the phosphorus reduction milestones for the phase in which relief is sought within 90 days of the close of the public comment period. EPA will address all relevant comments received during the comment period during the approval

or denial process and may change the Alternative Schedule requested by the permittee prior to approval, with the permittee's consent. If EPA were to fail to take action on the ASR within 90 days of the close of the public comment period, the request would be deemed approved. Any action by EPA approving or denying an ASR (or automatic approval after 90 days of inaction after the close of public comment period) would be a final agency action subject to judicial review in federal district court. EPA would retain discretion to deny a permittee's request based on permit non-compliance and use enforcement mechanisms where appropriate for those permittees.

Upon approval of an Alternative Schedule, the permittee would be required to update its LPCP to include the approved alternative schedule milestones and implement their LPCP according to the new approved schedule. Until ASR approval, permittees would remain subject to the original schedules and milestones contained in Appendix F Part III.1.

EPA is proposing to update Appendix F Attachment 3 to fix typographical and formatting errors, to correct Tables 3-18, 3-20, and 3-21 to match the corresponding graphical representations of the pollutant removal data, and to include updated pollutant removal information consistent with the most recent information applicable to structural controls implemented in New England. Appendix F, Attachment 3 does not impose any requirements on permittees. It describes the types of structural stormwater controls for which EPA currently has quantifiable pollutant removal information and how to determine the resulting load reductions for pollutants. Permittees could choose, but are not required, to install the specific stormwater controls described in Appendix F, Attachment 3.

Appendix H

Consistent with the proposed modification to Part 2.2.2., EPA proposes to modify Appendix H Part I, II, III and IV to specify that if a permittee becomes aware that they are discharging to an impaired water that is impaired due to a pollutant addressed by Appendix H during the permit term, the permittee has 90 days to update their SWMP to be consistent with the requirements in Appendix H associated with the identified pollutant. All Appendix H deadlines for the identified pollutant would be extended and based off the date of identification instead of the effective date of the permit. For instance, if a new 303(d) impaired waters list is approved by EPA during the permit term all permittees would have 90 days to update their SWMPs as necessary to address any new listed waterbodies where the impairment would cause the permittee to be subject to the requirements in Appendix H.

Consistent with the modification EPA is proposing for Part 2.0, EPA is proposing edits to one of the metrics for discontinuing Appendix H requirements for certain pollutants. In several places in Appendix H, the permittee would be relieved of Appendix H requirements for specific pollutants when the discharge is determined to meet applicable water quality standards, rather than applicable water quality criteria.

EPA also proposes to edit several footnotes in Appendix H to read that applicable water quality standards are the state standards that have been federally approved or promulgated as of the issuance date of the permit rather than the effective date. EPA has compiled those standards at http://www.epa.gov/waterscience/standards/wqslibrary/. For this purpose, "the issuance date of this permit" means the date that the permit was originally issued, that is, January 18, 2017.