EPA Response to Comments on:

National Pollutant Discharge Elimination System (NPDES) General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts (as Modified)

NPDES Permit No. MAR041000, MAR042000, and MAR043000

Dated: December 7, 2020

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

General Comments

1. Comment from the Massachusetts River Alliance:

Water will be at the center of many of the most profound economic, public health and ecological impacts of climate change in the Commonwealth—from public water supply reliability, to flooding, water pollution, and aquatic habitat. As climate change brings more intense storms and extreme flooding to our region, stormwater runoff will only increase, exacerbating current, and introducing new, pollutant concerns. The MS4 program is one of the Commonwealth's most powerful climate adaptation tools. We would like to take this opportunity to urge the Environmental Protection Agency (EPA) to make a significant commitment to robustly administering their MS4 program, including providing sufficient resources and staff. EPA must commit to restoring this critical program as it provides essential services for communities as they grapple with the impacts of stormwater.

2. Comment from Charles River Watershed Association (CRWA)

This permit for clean water and for the protection of public health in Massachusetts has never been more important as we confront the COVID-19 crisis. The permit will help drive green infrastructure, or nature-based solutions, reducing water pollution and improving water quality and stormwater management while also helping communities build resilience to climate change. CRWA has worked closely with the New England regional office of the U.S. Environmental Protection Agency ("EPA") over the last quarter century to make the Clean Water Act goals for the Charles River, its tributaries, and lakes and ponds a reality. Although the causes of the river's pollution are well understood, achieving a fishable and swimmable Charles River nonetheless remains elusive. Stormwater pollution remains the number one problem impacting the health of the Charles today. This problem is not unique to the Charles: "Stormwater is the largest contributor of pollutants to impaired rivers, lakes, streams, ponds, and other waters in Massachusetts."[1] The Charles is now experiencing more frequent cyanobacteria blooms in the summer and fall, necessitating posting of public health warnings along the river's banks. Excessive algae growth alters water chemistry, lowering dissolved oxygen necessary for fish and impairing recreational opportunities and the river's aesthetics. As established in the Nutrient Total Maximum Daily Load studies for the Charles River (2007; 2011), phosphorus pollution to the river needs to be reduced by more than fifty percent watershed wide. The development of Phosphorus Control Plans (PCPs) and the actions required in Appendix F for Charles River cities and towns—in conjunction with residual designation by EPA of other stormwater contributors—will significantly improve water quality in the Charles, protecting aquatic life and the health and safety of those who recreate on and along the river. Restoring urban green scapes and natural hydrologic function is at the heart of CRWA's Blue Cities Initiative™. We continue to work in partnership with Charles River communities on green infrastructure planning and construction projects, subwatershed restoration plans, and on watershed-scale resilience and climate adaptation through our Climate Compact. CRWA has conducted numerous well-attended trainings for watershed municipalities on the MS4 permit and appreciates EPA's involvement in these workshops. Although the 2016 permit did not finally take effect until July 1, 2018, many Charles River communities have made strides in managing their stormwater discharges in the

four years since it was issued. Through the creation of stormwater coalitions and collaborations with watershed groups, communities are now sharing expertise and resources. Every Charles River community will need to meet the permit requirements fully, including the actions/milestones to reduce phosphorus loading to the river prescribed in Appendix F. The MS4 permit builds on and accordingly is far more detailed than its 2003 predecessor, requiring an increased commitment of resources on the local level. CRWA calls on EPA New England to dedicate additional resources and staffing to its stormwater program, and to the implementation of this permit specifically, through compliance assistance, review of annual reports/filings, and enforcement when warranted. EPA's investment of additional resources to enable robust permit implementation now will move us closer to achieving a thriving river for people, fish, and wildlife for generations to come.

EPA Response to Comments 1 - 2

EPA acknowledges and appreciates the support for the permit and the importance of stormwater management for improved water quality in the Commonwealth of Massachusetts.

3. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, and the North and South Rivers Watershed Association:

While we are appreciative of some improvements that have been made to the MS4 permit, in other areas, we firmly believe that the permit needs to be strengthened. The Clean Water Act (CWA) contains an anti-backsliding provision which prohibits, with few exceptions, a permit to have less stringent effluent limitations than the previous permit (33 U.S.C. §1342(o)(1)). EPA guidance and permit manuals state, "the term anti-backsliding refers to statutory and regulatory provisions that prohibit the renewal, reissuance, or modification of an existing NPDES permit that contains effluent limitations, permit conditions, or standards less stringent than those established in the previous permit." (U.S. Envtl. Prot. Agency, NPDES Permit Writers' Manual, 2010, pp. 7-1 –7-4, https://www3.epa.gov/npdes/pubs/pwm_chapt_07.pdf.) The proposed permit revision is in violation of the backsliding provision highlighted in Section 402(o) of the CWA. At various points this permit both omits protective conditions previously included in prior MS4 permits and contains less stringent effluent limitations than prior permits. These concerns are further illustrated in our specific comments on the proposed modifications, organized by section, and provided below.

4. Comment from Save the Bay:

As you know, Congress enacted the federal Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The enumerated national goals include achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife..."33 U.S.C. § 1251(a)(2). States are required to "adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act)" 40 CFR § 131.2 Water quality

standards consist of three core components. This includes designated uses of a water body, criteria to protect designated uses, and antidegradation requirements to protect existing uses and high quality/high value waters. A key provision of the CWA is the "anti-backsliding" provision; it prohibits, with limited exceptions, the renewal, issuance or modification of a permit that contains" effluent limits that are less stringent than the comparable effluent limitations in the previous permit. 33 U.S. Code § 1342 (o).

As recognized by EPA, stormwater is a leading cause of poor water quality. Precipitation carries pollutants into nearby waterways, causing erosion and flooding, and degrading water quality affecting plants, fish, shellfish, wildlife, and human health. Stormwater permitting is one of the main tools to reduce stormwater pollution.

In general, we are concerned that the permit as modified is not as stringent as the permit it is modifying and not stringent enough to protect MS4 receiving waters from stormwater pollution in compliance with the CWA. The revised permit conditions delete the obligations of the permittee to develop and implement a plan to protect water quality, ensure that its discharge meets water quality standards, and ensure that its discharges do not cause or contribute to an exceedance of water quality standards. The draft permit does not contain some of the conditions of the prior MS4 permits that were more protective of receiving waters and contains conditions that are less stringent than prior permits in violation of the "anti-backsliding" mandate of the CWA. In fulfilling the CWA, the burden must remain on the MS4 to assess discharges, ensure water quality standards are met, and remedy discharges that cause or contribute to a violation of water quality standards expeditiously. If information shows the program is not sufficiently protective of water quality, the permit should be modified to include necessary limitations.

5. Comment from the Ipswich River Watershed Association:

We are very concerned that some of the proposed modifications to the MS4 permit will undermine the ability of municipalities and partner groups to effectively regulate stormwater. As outlined below, the modifications we oppose weaken protection of the receiving water bodies by only focusing on regulating discharges. In the aggregate, such weakening not only constitutes back-sliding which is prohibited by the Clean Water Act (CWA), but also runs against everything we've seen in helping towns improve water quality and protect limited water supplies for future generations.

The CWA contains an anti-backsliding provision which prohibits, with few exceptions, a permit to have less stringent effluent limitations than the previous permit (33 U.S.C. §1342(o)(1)). EPA guidance and permit manuals state, "the term anti-backsliding refers to statutory and regulatory provisions that prohibit the renewal, reissuance, or modification of an existing NPDES permit that contains effluent limitations, permit conditions, or standards less stringent than those established in the previous permit. In violation of the backsliding provision highlighted in Section 402(o) of the CWA, at various points this permit both omits protective conditions previously included in prior MS4 permits and contains less stringent effluent limitations than prior permits. These concerns are further illustrated in our specific comments on the proposed modifications, organized by section, and provided below.

EPA Response to Comments 3 - 5

EPA's modifications to the 2016 MA general permit requirements clarified the effluent limitations established in that permit but did not alter those limitations in terms of what the permittees must do to reduce the discharge of pollutants, i.e., it did not reduce or increase the stringency of those requirements. Thus, EPA disagrees with commenters' assertions that the permit provisions, as modified, are less stringent than the requirements of the permit as issued in 2016. Further, EPA disagrees that the modifications to permit parts 2.0 and 2.1 constitute more than clarifying edits to the permit, because the actual requirements applicable to permittees are stated directly in parts 2.1.1(a) through (d).

In the alternative, even if the requirements were to be interpreted as less stringent, such changes would be permissible under anti-backsliding requirements due to the new information provided by the parties to EPA through the mediation process, which enabled EPA to better present these requirements, so as to ensure a clearer understanding as to the permit's water quality-based effluent limitations. Examples of such new information include parties' explanations of their divergent interpretations of the permit requirements in this part, which revealed a need for EPA to clarify this permit part's structure and intent.

6. Comment from the Massachusetts Coalition for Water Resources Stewardship:

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

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

7. Comment from the Massachusetts Coalition for Water Resources Stewardship:

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

8. Comment from the Town of Bellingham:

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

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

9. Comment from the Town of Bellingham:

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

10. Comment from the Central Massachusetts Regional Stormwater Coalition:

The Central Massachusetts Regional Stormwater Coalition (CMRSWC) supports the proposed permit modifications to the National Pollutant Discharge Elimination System (NPDES) 2016 Massachusetts Small MS4 General Permit posted to EPA Docket EPA-R0l-OW-2020-0216 in April 2020. CMRSWC appreciates that the proposed permit modifications allow more flexibility for Towns and Cities to customize their stormwater management programs to best meet the needs and constraints of their community while still complying with the Clean Water Act and permit Requirements.

11. Comment from the National Association of Clean Water Agencies

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

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

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

EPA Response to Comments 6 - 11

EPA acknowledges and appreciates the commenters' support for the proposed modifications that were the result of the mediated settlement. EPA disagrees with commenters' statements regarding the legal authorities for the original permit provisions and these permit modifications. It is EPA's view that EPA correctly stated these provisions' underlying legal authority in the 2016 permit fact sheet and response to comments and provided the basis for these modifications in the Statement of Basis for these proposed modifications.

Part 2.0

12. Comment from Save the Bay:

In this section, EPA proposes deleting language that requires the permittee "to develop, implement and enforce a program to reduce the discharge of pollutants from the MS4 to the maximum extent practicable; "protect water quality and meet water quality standards. The Statement of Basis provides that this is a "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. This substantive change that weakens the obligation of the permittee and was not adequately explained. The change should not be made. As in prior permits, the permittee should continue to be required to develop, implement and enforce a program to satisfy the water quality requirements of the Clean Water Act and the Massachusetts Water Quality Standards.

EPA Response to Comment 12

EPA intended that the proposed modifications to part 2.0 would introduce the purpose and requirements of the specific WQBELs that follow in part 2.1.1. The permit modification is intended to clarify that part 2.0, by itself, did not constitute a separate permit requirement, and thus violation if not met; rather, a permittee would violate the permit's WQBELs by violating any provision in part 2.1.1 of the modified permit. Thus, EPA disagrees with the commenter's interpretation that the proposed deletion of the provision that "the permittee shall develop, implement, and enforce a program" in this particular location in the permit removes permittee's obligation to do exactly that. The permittee's obligations to implement water quality-based effluent limitations are the same in the modified permit, which continues to include detailed requirements for how a permittee must develop, implement, and enforce an MS4 program, thereby altering neither the permittee's responsibilities under the permit nor the pollutant reductions to be achieved.

Part 2.1

13. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Maintain the original general statement for the permit that discharges do not "**cause or contribute to an exceedance of**" water quality standards. EPA's proposed replacement language, "meet applicable," diminishes the enforceability of the permit's terms because rather than requiring the permittee to demonstrate noncompliance with the MS4 discharging pollutants and a resulting exceedance of water quality standards, there must instead be a demonstration that the discharge failed to meet pollutant reduction requirements, which have been weakened in this permit draft. EPA's proposed modification would diminish protections for the receiving water body. The former language is more protective of receiving waters, because the standard would be that discharges "do not cause or contribute to an exceedance of WQS." The proposed replacement will only regulate the water quality of the discharge itself, not the receiving waters. The discharge should both meet water quality standards and not cause or contribute to an exceedance of water quality standards. If the receiving water body has better water quality than the discharge that barely meets water quality standards, then the receiving water body will become degraded by the discharge, even if the latter meets water quality standards.

14. Comment from Save the Bay:

This section weakens protections afforded to receiving waters by deleting the requirement that the permit must ensure that its discharges "do not cause or contribute to an exceedance of water quality standards" (WQS) and replacing it with ensuring that "discharges meet applicable water quality standards (as defined and limited in 2.1.1). By deleting the language, the MS4 is not in violation if it is discharging pollutants that result in an exceedance of water quality. Protections to receiving waters are further diminished by the attempt to change TMDLs "established as of the date of issuance of this permit." See comments on Section 2.2.2. The deleted language is more protective of receiving waters. The discharge should both meet water quality standards and not cause or contribute to an exceedance of water quality standards.

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

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

EPA Response to Comments 13 -15

EPA outlined the legal authority for including WQBELs in this permit in the Response to Comments to the 2016 permit. *See* 2016 MA RTC, response to comments 92-112. EPA disagrees with some commenters' characterization of EPA's legal authority to include WQBELs.

As a result of mediation, EPA agreed to propose to modify the permit language from "reduce the discharge of pollutants such that the discharges from the MS4 do not cause or contribute to an exceedance of water quality standards" to "permittee's discharges shall meet applicable water quality standards." It is EPA's view that EPA has authority under CWA section 301(b)(1)(c) to articulate this requirement either way. It is also EPA's view that this proposed modification, like the original permit language, simply and clearly points the permittee to specific measures in parts 2.1.1(a)-(d) that the permittee must follow in order to ensure that stormwater discharges meet water quality standards. The modifications retain the original permit structure that directs permittees to comply with the appropriate requirements of Appendices F and H. It is EPA's view that it is reasonable to include requirements to meet the assumptions and requirements of only those TMDLs that existed as of the time of permit issuance or modification – in this case, Appendix F includes requirements specific to the relevant existing TMDLs. It would not be reasonably possible to include permit requirements tied to TMDLs that have not yet been established at the time of permit issuance or modification and doing so may not provide fair notice to potential affected permittees. Appendix H includes permit limits for MS4 discharges to water quality-limited waters for which there is not yet a TMDL. Future MA Small MS4 General Permits will include any necessary limitations to be consistent with the assumptions and requirements of any TMDLs that have been approved or established by EPA since the 2016 MA Small MS4 General Permit was issued.

Part 2.1.1

16. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Section 2.1.1a -Requirement to Meet Water Quality Standards

We recommend the following changes:

Same comment as Section 2.1. The proposed modification, "meet applicable" weakens the intent of this section and should be corrected to "**cause or contribute to an exceedance of**."

17. Comment from the National Association of Clean Water Agencies:

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

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

18. Comment from Save the Bay:

Section 2.1.1.a. This section assumes that if the permittee meets all other permit requirements the discharge will meet water quality standards. Such an assumption is not correct. The proposed change, combined with deleting the language, that the permit must ensure that its discharges "do not cause or contribute to an exceedance of water quality standards" (Section 2.1), decreases the protection given to the receiving waters.

EPA Response to Comments 16 -18

See EPA Response to Comments 13 -15.

19. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Section 2.1.1b -Requirement to Meet Water Quality Standards

We recommend the following changes:

Remove the option for an "alternative schedule," which extends deadlines and further weakens the permit's requirements.

20. Comment from Save the Bay:

Section 2.1.1 b. The offer to avoid compliance by applying for an "alternative schedule" should be removed. The permittee should be required to reduce the discharge as expeditiously as possible. There should not be an option to extend the deadline.

EPA Response to Comments 19 - 20

As indicated in the Statement of Basis, EPA has become aware that there may be extenuating circumstances that make meeting the schedules in Appendix F Part I impracticable. EPA expects that the need to request an alternative schedule would happen rarely. For these reasons, and for the reasons included in the statement of basis, EPA is finalizing the permit modification as proposed.

21. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Section 2.1.1d -Requirement to Meet Water Quality Standards

We recommend the following changes:

Remove the addition of the requirement of an official notice from EPA and MassDEP that there is an exceedance of a water quality standard, "notice from EPA or MassDEP to the permittee that a discharge of a pollutant from the MS4 that is exceeding applicable water quality standards." This would indicate that it is unlikely that the permittee will have to "reduce or eliminate the pollutant in its discharge." This addition also creates a barrier to citizen suits when EPA and MassDEP have failed to provide sufficient notice.

Remove the following addition, "However, where such remedy or elimination within 60 days is impracticable, the permittee shall submit to EPA, by the same deadline, a schedule of actions to achieve a remedy or elimination in the shortest time not impracticable. The permittee shall implement such actions on the schedule submitted to EPA and report on progress in its annual reports unless or until EPA takes any other action that effectively replaces the schedule." A permittee can claim that reducing or eliminating the pollutant is impracticable, and instead of reducing or eliminating the pollutant in 60 days, they need only submit a schedule to do so in their annual report. Rather than actually reduce the pollution as expeditiously as possible, the permittee need only set a schedule to reduce "in the shortest time not impracticable." There is no way to include such a schedule in an annual report that is due in 6, 10, or even 12 months. In addition, the permittee should not be the party that defines what constitutes "impracticable." This is a substantial weakening of the permit. This change diminishes protection of the water body by restricting regulation to the discharge only, not the discharge's effect on the receiving water body.

Maintain the appropriate original language for this section, **"Except where a pollutant of concern in a discharge is subject to the requirements of part 2.2.1 and/or part 2.2.2 of this permit or is the result of an illicit discharge and subject to part 2.3.4 of this Permit, if a pollutant in a discharge from the MS4 is causing or contributing to a violation of applicable water quality criteria for the receiving water, the permittee shall, as expeditiously as possible, but no later than 60 days of becoming aware of the situation, reduce or eliminate the pollutant in its discharge such that the discharge meets applicable water quality criteria."**

22. Comment from Save the Bay:

Section 2.1.1 d. Discharges that exceed WQS should be addressed as expeditiously as possible. The revisions to this section should be removed and the original language retained in full. The proposed change requiring notice from EPA or MassDEP "that a discharge of a pollutant from the MS4 is exceeding applicable water quality standards" puts the onus on EPA and MassDEP to discover the discharge, removes the burden from the permittee and weakens protection of

receiving waters. Given limited resources and the difficulties finding the exceedances, it is unlikely that the MS4 will receive a notice from EPA or MassDEP that there is an exceedance of a WQS. The permittee should continue to be obligated to "as expeditiously as possible" and in no event, longer than 60 days, reduce or eliminate the pollutant in its discharge that is exceeding WQS. The burden is more properly on the discharger to actively assess and monitor their discharges, and to correct problems, whether discovered through their own assessment or by others. This section attempts to fundamentally alters the right of citizen to enforce compliance with the CWA 33 USC § 1365, as a Notice of Intent could not be filed if discharges are exceeding water quality standards unless EPA or MassDEP provided notice to the permittee. The modifications should be removed and the original language retained.

23. Comment from the Massachusetts Department of Conservation and Recreation:

2.1.1.d Requirement to Meet Water Quality Standards We appreciate that EPA has given the flexibility to extend the schedule to remedy the exceedance or eliminate the discharge of a pollutant from DCR's MS4 that is exceeding applicable water quality standards beyond 60 days if the permittee determines that remedy or elimination within 60 days is impracticable. This flexibility, paired with the requirement that the permittee shall submit to EPA, by 60 days from the discharge, a schedule of actions to achieve a remedy or elimination in the shortest time not impracticable, will allow DCR to implement correct, long-term controls instead of just a stopgap approach.

24. Comment from MassDOT:

2.1.1.d Requirement to Meet Water Quality Standards We appreciate that EPA has given the flexibility to extend the schedule beyond 60 days to remedy the exceedance or eliminate the discharge of a pollutant from the MS4 that is exceeding applicable water quality standards, if the permittee determines that remedy or elimination within 60 days is impracticable. This flexibility, paired with the requirement that the permittee shall submit to EPA "a schedule of actions to achieve a remedy or elimination in the shortest time not impracticable," will allow the permittee to implement effective long-term controls.

EPA Response to Comments 21 -24

The permit as written in 2016 did not assign responsibility to any party for determining whether there is an exceedance to be remedied. In these modifications, the Agency is clarifying that the agencies with responsibility for making that determination must notify the MS4 in the event of an exceedance resulting for a discharge that is not otherwise subject to the requirements of the permit, as specified in Part 2.2.1, Part 2.2.2 and/or Part 2.3.4. Should there be such a determination, it is incumbent on those agencies to communicate such finding to the MS4. The requirement for EPA or MassDEP to notify the permit holder that they discharging to a Water Quality Limited waterbody and are subject to additional terms and conditions contained in the permit can come in many forms, as discussed in EPA Response to Comments 27 -29. The permit conditions would simply require a citizen group to submit the data indicating that a permittee's discharge is not meeting water quality standards to EPA or MassDEP, which would then determine whether the discharge in question was covered by the MS4 permit and whether the data indicated a violation of water quality standards. EPA would then pass

the data on to the permit holder. EPA does not anticipate additional analysis of the monitoring data submitted to either agency.

Unlike the pollutant-specific limitations addressed in Appendices F and H, any other pollutant concerns that may arise may present challenges that are unforeseen at the time of permit issuance/modification. Whereas in most instances such discharges may be reduced or eliminated within 60 days of notification, there may be circumstances where 60 days is insufficient time to expeditiously eliminate the cause of impairment and it is EPA's view that the MS4 is in the best position to develop a schedule for remediation, subject to EPA oversight. Moreover, as noted in the comment from the Massachusetts Department of Conservation and Recreation and Mass DOT, such an approach would encourage implementation of effective long-term solutions rather than short-term remedies that may fail to adequately address the cause of such discharges.

As noted in the Statement of Basis, EPA does not anticipate that scenarios such as this will arise often, if at all, and therefore believes that this approach is a reasonable one for dealing with such circumstances should they occur. Further, in response to the comment that this modification presents a barrier to citizen suits when the Agency and/or Mass DEP have failed to provide "sufficient notice," the Agency's view is that the appropriate action would be to take action against EPA or the state, rather than to take action against the permittee.

Part 2.1.2

25. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

We support the following revision:

"If an applicable MassDEP approval specifies conditions or requirements related to the increased discharge, **such requirements may be independently enforceable under State law and may be adopted into a future permit**." This language appropriately recognizes future actions to be taken by MassDEP.

26. Comment from Save the Bay

We support the language clarifying that "...such requirements may be independently enforceable under State law and may be adopted into a future permit."

EPA Response to Comments 25 - 26

EPA appreciates the commenters' support for this modification.

Part 2.2

Part 2.2.2

27. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

We recommend the following changes:

Same comment as Section 2.1. The proposed modification, “meet applicable” weakens the intent of this section and should be corrected to “**cause or contribute to an exceedance of**.” Again, it seems to be the discharge itself being regulated, not the discharge and its effect on the receiving water body.

On the May 4th, 2020 MS4 Webinar, EPA’s Newton Tedder noted that the 303d listing would be notification of impairment, indicating that no further formal notification would be necessary. If this is EPA’s intention, this should be explicitly stated in the new permit.

28. Comment from Save the Bay:

The limitation in this section to TMDLs “established as of the date of issuance of this permit” should be deleted. Permittees should be required to update their SWMP to address TMDLs established during the term of the permit.

It was stated by Newton Tedder stated in the webinar on May 4, 2020, that 303(d) listing would provide notification of a discharge to a water quality limited water. The language should be amended to clarify that if listed on the 303(d) such listing constitutes notification and no further notice from EPA or MassDEP is required. The language "causing or contributing to an excursion above water quality standards" should be reinstated and the proposed amendment “discharge not meeting applicable water quality standards" removed. Again, it weakens the protection afforded to the receiving water and the burden on the permittee.

29. Comment from MassDOT:

SWMP Update to Address Revised 303d Lists Please confirm that permittees will be formally notified that the 303d status of a waterbody has changed since it would be difficult to know of a change since the 303d lists are not finalized nor issued on a predictable schedule. For example, the 2016 list was just recently finalized and the 2018 list is still draft. Once notified, 90 days would be enough time to update the SWMP.

EPA Response to Comments 27 -29

See EPA Response to Comments 13 -15.

The definition of “water quality-limited” waterbody in the permit remains unchanged:

> “Water Quality Limited-Water – for the purposes of this permit, a water quality limited water is any waterbody that does not meet applicable water quality standards, including but not limited to waters listed in categories 5 or 4b on the

Massachusetts Integrated Report of waters listed pursuant to Clean Water Act section 303(d) and 305(b)." *See* Appendix A.

An EPA-approved Section 303(d) list is not the only trigger for additional requirements in the MA MS4 Permit. The modification at issue here addresses how permittees will be notified that they are discharging to a Water Quality-Limited waterbody and makes clear that EPA or MassDEP needs to inform the permittee in such a case. This notification can come in the form of an email or letter alerting the permittee that a new Section 303(d) list has been approved by EPA for the Commonwealth of Massachusetts. It would then be the responsibility of the permittee to update its SWMP accordingly to account for any new impairments to waters to which it discharges, as well as any delisting of impairments that may relieve the permittee of further obligations. EPA or MassDEP may also find, or be alerted, that a permittee's discharge is to a Water Quality-Limited waterbody that is not listed as impaired on the 303(d) list. In such a case EPA or MassDEP would review that information and may alert the permittee in writing that it is discharging to a Water Quality Limited water and is subject to additional permit requirements. Appendix H of the permit has also has also been modified to allow permittees 90 days to update their SWMP after notification to address the new impairment listings (or de-listings) on the Section 303(d) list or awareness that they are discharging to a Water Quality-Limited Water not listed on the 303(d) list.

Part 2.3.3

30. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Clarify the following, "The SWMP, all documents submitted to EPA in accordance with Appendix F, and all annual reports shall be available to the public utilizing the permittee's website, **other website, or other means**." This language should be strengthened in order to carry out the stormwater program's intent and minimum measures for public involvement. Notice and access are critical for meaningful public involvement and participation. The permittee should be required to post and conspicuously publicize the availability of documents on the permittee's website unless website posting is infeasible. At a minimum, the permittee should be required to explain why it cannot post to its own website. The language should also be amended to clarify what "other website" may entail.

31. Comment from Save the Bay

We support the website notification but suggest that the language should require the posting be conspicuous on the permittees website and the unclear phrase "other website or other means" be removed.

EPA Response to Comments 30 - 31

Consistent with Part 1.10.1 of the permit, a permittee must post these documents on its website if it has one. EPA clarified the language in this part to make it more consistent with other parts of the permit. If a permittee does not have a website, it must inform the public by another means, which could include, for example, emailing the documents upon request or having them available at a town office and/or library during normal business hours. EPA agrees that public participation is important for stormwater management. The only instance where permittees will not post these documents on their website is if they do not have a website so any further explanation is not necessary.

Part 2.3.5

32. Comment from Save the Bay:

Section 2.3.5.c.ii.1 The meaning of "consideration of potential water quality impacts" is unclear and the language should be revised to specify what is required and the obligation on the permittee to address the information evaluated.

33. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Section 2.3.5.c.ii.1 -Construction Site Stormwater Runoff Control

We recommend the following changes:

Clarify the following, **"consideration of potential water quality impacts."** Many of the proposed changes relate to regulating just the discharge and weakening protection of the receiving water body, as first noted in 2.1. How is the permittee supposed to consider potential water quality impacts of a discharge if the permit itself does not take into consideration the effects of the discharge on the receiving water body? This language should also be amended to clarify how the permittee must respond in consideration of these potential water quality impacts.

EPA Response to Comments 32- 33

40 CFR 122.34(b)(4)(i)(D) requires that permittees develop and implement "Procedures for site plan review which incorporate consideration of potential water quality impacts." This language is self-explanatory in the context of construction site stormwater management. The site plan review process must not only be a review of the engineering specifications but also a review to ensure BMPs have been selected to minimize pollution on site. This review will be different for each site plan review based on the land use at the site, slope of the site, geology of the site, and other local factors. EPA finds that further definition is unnecessary to ensure consistency with 40 C.F.R. § 122.34(b)(4)(i)(D).

34. Comment from Save the Bay

Section 2.3.5.c.ii.2 The phrase "they are working as described in the approved plans" should be deleted and replaced with "installed as designed."

35. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Section 2.3.5.c.ii.2 -Construction Site Stormwater Runoff Control

We recommend the following changes:

Amend current language "the requirement that inspections of BMPs occur during construction of BMPs as well as after construction of BMPs to ensure **they are working as described in the approved plans"** to instead use the customary **"installed as designed."** This is far easier to document than expecting a permittee to capture how "they are working as described in the approved plans."

EPA Response to Comments 32 - 35

EPA disagrees that "working as described in the approved plans" is substantially different than "installed as designed." In fact, the BMPs should be working as described in the approved plans in order to ensure the intent and outcome of the installed BMP is being met, not that the approved BMP was merely installed correctly. A properly installed BMP that is not reducing pollution as intended and described in the approved plan should be augmented and replaced as necessary to ensure the proper reduction of pollutants is taking place on site. EPA is thus finalizing the permit modification as proposed.

36. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

We support the following revision:

●"The construction site stormwater runoff control program required by this permit is a separate and distinct program from EPA's **Construction General Permit in that the former is implemented by the MS4 operator to ensure that runoff from construction sites discharging to the MS4 are controlled consistent with the MS4's applicable requirements, whereas the latter is implemented by construction site operators to comply with the terms and conditions of EPA's permit (https://www.epa.gov/npdes/2017-construction-general-permit-cgp."** This addition is an improvement as it clarifies that the permittee can impose sanctions for noncompliance with ordinances for sediment and erosion control.

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

EPA's NPDES stormwater program regulates discharges of pollutants through point sources into U.S. waters from certain sized construction sites through its Construction General Permit (CGP). That permitting obligation applies to the construction site operator regardless of whether the regulated activity occurs within an MS4 or not. In its initial permits, EPA had required MS4 operators in MA and NH to implement strict and confusing mandates that potentially conflicted with and complicated a construction operator's pursuit of a CGP. While MS4 operators may develop municipal-specific controls to help meet appropriate and applicable NPDES requirements or even to address local environmental concerns, EPA's prior mandates on MS4 operators potentially and unnecessarily conflicted with elements of the CGP program and added avoidable expense to development. For example, in the original MA and NH MS4 permits, municipalities were forced to apply low impact design (LID) and green infrastructure mandates whenever the opportunity existed for such requirements, without considering the costs of benefits of doing so in any given situation. The proposed permits provide more flexibility, including considerations regarding whether such practices are "feasible" and cost-effective. In doing so, EPA also has appropriately adopted the definition of what is "infeasible" from its Effluent Limitations Guidelines for Construction and Development, previously negotiated by EPA and NAHB.1The proposed revised MA and NH MS4 permits address concern sin Section 2.3.5 raised by NAHB during the mediation. NAHB supports the amendments that EPA has proposed fort his section of both the NH and MA permits, as they make the permit easier to understand and add important clarifications. Most importantly, the Agency has clarified that municipalities may rely on EPA Region 1's CGP for compliance with this section. To the extent that requirements of the CGP already require stormwater controls, there is no need for EPA to duplicate or confuse those mandates through its small MS4 permit. The proposed permit streamlines and improves the permitting processes for both the municipalities and construction site operators while considering environmental factors more specific to the region. Furthermore, the amendments illuminate that the stormwater controls required by this permit only are for stormwater entering the MS4 system. The permit places no requirements on municipalities to regulate construction site stormwater that does not enter an MS4. NAHB has long asserted that Congress limited EPA's NPDES permitting authority over MS4s to controlling the discharge of pollutants from the MS4 system to the maximum extent practicable (MEP).2The MEP standard is undefined in the CWA, meaning that the EPA Administrator or the state NPDES authority may use their discretion to determine appropriate controls for pollutants discharged from MS4s, as long as all such methods of MEP relate to the "control of such pollutants."3The only authority Congress gave EPA over what is discharged into the MS4 system is to specifically prohibit "non-stormwater" discharges into storm sewers.4Otherwise, EPA's only authority is to develop "controls to reduce the discharge of pollutants" in stormwater discharges from MS4s "to the maximum extent practicable."5While NAHB recognizes that EPA does not necessarily agree with these limitations on its authority, NAHB believes that the proposed revisions to the MA and NH MS4 permits capture the essence of NAHB's assertions; the CGP adequately controls the discharges of pollutants from regulated operations and achieve an appropriate balance; whether discharged directly to U.S. waters or through the MS4. The state

and/or MS4 may use its other authorities to help achieve other local environmental objectives. For Massachusetts, the State has used authority under the Clean Water Act Section 401 "certification" process to help ensure that MS4s apply controls otherwise mandated in most instances by state law (and application of the MA Stormwater Manual).6New Hampshire has asserted similar requirements through the development of model ordinances and other guidance within the state. EPA appears to have captured all of these requirements appropriately in its MA and NH revised drafts. Finally, throughout the revised permit, EPA has more properly listed and cited those state resources required through prior 401 certifications by providing the version numbers and publication dates. This is important because more general references do not recognize that an entity could amend its manual/standard and regulators could expect municipalities to comply with the amendment, which would otherwise not have been properly vetted by the public as required under the Administrative Procedure Act

EPA Response to Comments 36 - 37

EPA acknowledges and appreciates the commenters' support for the proposed modifications to this section.

Part 2.3.6

38. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

While we support the addition of language confirming that "Stormwater management systems design shall be consistent with, or more stringent than, the requirements of the 2008 Massachusetts Stormwater Handbook," the language should be amended to make explicit that new versions of the Stormwater Handbook must be adhered to. We suggest that the sentence be amended to "...2008 Massachusetts Stormwater Handbook or as updated."

39. Comment from Save the Bay

Section 2.3.6.a.ii. 2. We support the change that systems shall be "consistent with or more stringent than" the requirements of the 2008 Stormwater Handbook. However, the language should be amended to clarify that it must be consistent with the most recent version of the Stormwater Handbook.

EPA Response to Comments 38 - 39

NPDES permits should reference outside resources with versions and publication dates in order to provide certainty of permit requirements and necessary compliance obligations. EPA is thus finalizing the permit modification as proposed.

40. Comment from the Massachusetts Department of Conservation and Recreation:

2.3.6.a.ii Stormwater Management in New Development and Redevelopment Ordinance We support that extension of the deadline for development or modification of an ordinance or other regulatory mechanism (written policies or procedures for DCR as a non-traditional MS4) from within two (2) years to within three (3) years of the effective date of the permit. MassDEP has indicated that they expect to update their Stormwater standards, thus, it makes sense to wait till these updates are completed so the new procedures can address both stormwater treatment standards in the MS4 permit and MassDEP WPA requirements. Since MassDEP has not yet held the Stormwater Advisory Committee meetings or issued a statement with expected changes, we have not been able to develop procedures. We hope that the MassDEP can continue to work on the standards and host Advisory meetings using teleconferencing technology such that these updates can be completed by Fall 2020 to allow us to have ample time for internal review and approval of new procedures with these changes.

41. Comment from MassDOT:

2.3.6.a.ii Stormwater Management in New Development and Redevelopment Ordinance We support the extension of the deadline for development or modification of an ordinance or other regulatory mechanism from within two (2) years to within three (3) years of the effective date of the permit. MassDEP has indicated that they expect to update their Stormwater Standards, thus, it makes sense to wait until these updates are completed so the new ordinance can address both stormwater treatment standards in the MS4 permit and MassDEP requirements. Since MassDEP has not yet held the Stormwater Advisory Committee meeting on aligning the Stormwater Standards with the MS4 regulations, municipalities have not been able to develop a local ordinance to address these requirements and the unknown stormwater requirements makes design and permitting of roadway improvements, including those municipal projects funded by MassDOT, difficult since the requirements may change. We hope that the MassDEP can continue to work on the standards and host Advisory meetings using teleconferencing technology such that these updates can be completed by Fall 2020 to provide municipalities ample time for approval of new ordinances with these changes.

EPA Response to Comments 40 - 41

EPA acknowledges and appreciates the commenters' support for extending the deadline by one year for the new development and redevelopment ordinance or regulatory mechanism.

42. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Strike section 2.3.6.a.ii.3.a.4, "utilizing offsite mitigation that meets the above standards within the same USGS HUC12 as the new development site." While it is circumscribed to the same HUC 12 (subwatershed) that may limit its use, there are very few greenfield sites where onsite

retention and pollutant removal is not possible. This language would weaken the intent of the permit and should be removed.

43. Comment from Save the Bay

Section 2.3.6.a.ii.3.a.4. This section should be removed. Offsite mitigation should not be allowed on new development sites.

44. Comment from the Massachusetts Department of Conservation and Recreation:

2.3.6.a.ii.3.a.4 Off Site Mitigation for New Development We support the extension of allowing for offsite mitigation for new development in our stormwater management procedures. It is important to give the flexibility of providing offsite mitigation for new development, thereby allowing for greater flexibility in design layouts that will meet all the needs of a site while protecting the environment to the greatest extent possible.

45. Comment from MassDOT:

2.3.6.a.ii.3.a.4 Off Site Mitigation for New Development We support the extension of allowing for offsite mitigation for new development in a municipality's ordinance/ regulatory mechanism. It is important to give the flexibility of providing offsite mitigation for new development thereby allowing for greater flexibility in design layouts that will meet all the needs of a site while protecting the environment to the greatest extent possible.

EPA Response to Comments 42 - 45

Some commenters are in favor of allowing offsite mitigation on new development sites, while other commenters are opposed to this change. EPA finds that the ability to utilize offsite mitigation in the same HUC 12 watershed for new development provides additional flexibility to meet post-construction stormwater management requirements while also ensuring that any pollution reduction is realized as close to the development site as possible (in order to protect the same portion of the receiving water body). EPA notes that the ability to utilize offsite mitigation is an option for permittees to include in their bylaws or regulatory mechanism, not a requirement. Permittees may choose to include this option for new development projects or choose not to include it based on local conditions and priorities. EPA agrees that, practically, offsite mitigation may be used infrequently to control stormwater, and it can be easily installed on greenfield sites utilizing LID planning techniques.

46. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

We support the following revisions:

"Low Impact Development (LID) site planning and design strategies must be implemented unless infeasible in order to reduce the discharge of stormwater from development sites." This is a

significant improvement given the recognized co-benefits of Low Impact Development (LID) for the environment.

"Utilizing offsite mitigation that meets the above standards within the same USGS HUC12 as the redevelopment site." This change to allow offsite mitigation for redevelopment only in the same HUC 12is an improvement. Anywhere in the same HUC 10—the prior permit provision—results in far less, and sometimes no, environmental benefit for the impaired segment when offsite is far downstream. Routine, full onsite compliance must be achieved first before offsite mitigation is allowed.

47. Comment from Save the Bay

Section 2.3.6.a.ii.4.a.4. We support limiting offsite mitigation for redevelopment sites to the same HUC 12.

48. Comment from the Massachusetts Department of Conservation and Recreation:

2.3.6.a.ii.4.a.4 Off Site Mitigation for Redevelopment We continue to support allowing for offsite mitigation for redevelopment projects in our stormwater management procedures but strongly encourage that the size of watershed considered for offsite locations be retained at USGS HUC10 instead of the revision to USGS HUC12. The smaller HUC12 watersheds restrict the possible locations owned by the DCR that could be used for mitigation. The smaller watershed area will mean that offsite mitigation will often be infeasible.

49. Comment from MassDOT:

2.3.6.a.ii.4.a.4 Off Site Mitigation for Redevelopment We continue to support allowing for offsite mitigation for redevelopment projects in a municipality's ordinance/ regulatory mechanism but strongly encourage that the size of watershed considered for offsite locations be retained at USGS HUC10 instead of the revision to USGS HUC12. The smaller HUC12 watersheds restrict the possible locations, either owned by the permittee or available for purchase, that could be used for mitigation. The smaller watershed area will mean that offsite mitigation will more often be infeasible.

EPA Response to Comments 46 - 49

Some commenters are in favor of reducing the watershed size available for offsite mitigation on redevelopment sites from a USGS HUC-10 to a HUC-12, while other commenters are opposed to this change. EPA finds that the ability to utilize offsite mitigation in the same HUC 12 watershed provides additional flexibility to meet post-construction stormwater management requirements while also ensuring that any pollution reduction is realized as close to the redevelopment site as possible (in order to protect the same portion of the receiving water body). EPA notes that the ability to utilize offsite mitigation is an option for permittees to include in their bylaws or regulatory mechanism, not a requirement. Permittees may choose to include this option for redevelopment projects or choose not to include it based on local conditions and priorities.

50. Comment from Save the Bay

Section 2.3.6.a.ii.1. We support the requirement that LID strategies must be implemented unless infeasible.

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

NAHB has asserted that EPA's CWA authority to mandate "post-construction" stormwater controls is extremely limited and that EPA has not properly expanded the NPDES stormwater program to allow the Agency to assert more than nominal control over such discharges absent state or local assistance. Here, once again, MA and NH had used their prior Section 401 certification processes to provide EPA with authority in these MS4 permits to control post-construction stormwater discharges consistent with existing state laws and guidance. In challenging EPA Region 1's prior MA and NH MS4 permits, NAHB had set forth its interpretation of the Agency's limited authority, which would not justify the types of mandates included in those prior permits. More specifically, NAHB asserts that EPA's authority under CWA section 402 is to permit the addition of pollutants from point sources to the waters of the United States.7The Agency is "powerless to regulate point sources themselves."8In the previous Permit Section 2.3.6, the Agency required, among other things, the permittee to compel new developments and redevelopments to meet two stringent requirements. The new development ostensibly had to: (1) retain a specified amount of stormwater onsite based on total impervious surface; and(2) remove specified amounts of total suspended solids and phosphorus. By tying the retained stormwater to impervious surface area and not pollutants, the Agency also appeared to be usurping the State's/municipality's authority over land use. Further, by setting strict TSS and phosphorous requirements, the EPA was not regulating the "addition of any pollutant to navigable waters from any point source," but regulating the addition of pollutants to a point source. Additionally, NAHB believed that EPA overstepped its authority by requiring new developments and redevelopments to recharge groundwater. This requirement did not appear to be connected to pollutants being discharged from the MS4, or even pollutants entering the MS4. The condition is required to ensure an adequate supply of groundwater exists. NAHB believes that EPA's CWA authority does not stretch that far. Finally, the EPA required various low impact development (LID) practices and other mandates on MS4s that NAHB believed were infringing on state and local authority. EPA should not be allowed to usurp the "the primary responsibilities and rights of States to plan the development and use of land. . .."11NAHB was not merely focused on legal arguments; the very nature of home building includes earth moving activities that NAHB's members must comply with through federal, state and local stormwater regulations. While EPA's MS4 permits should be directed at municipalities, here the permit and its terms directly affect NAHB members that are the ultimate targets of some of EPA's mandates. Specifically, EPA's minimum control measures for post-construction stormwater control (one of EPA's six minimum control measures it created to further explain MEP) creates obligations for municipalities to place limitations on the development community in the form of codes, ordinances, or other enforceable mechanisms. Certain BMPs required by the prior MA and NH MS4 permits were too far removed from the stated goal of "controlling the discharge of pollutants" to state waters. Overly-prescriptive solutions targeted too far upstream

of the MS4 itself can fetter permittees, denying them the flexibility to invest in better bang-for-the-buck solutions to reach water quality goals. When requirements unnecessarily meddle in existing local land use control procedures, they can be highly disruptive since those existing procedures have often been negotiated with the development community over several decades.

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

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

EPA Response to Comment 50 - 51

EPA appreciates the commenter's support for these modifications.

Part 2.3.7

52. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Same comment as Section 2.1. The proposed modification, "meet applicable" weakens the intent of this section and should be corrected to "**cause or contribute to an exceedance of."**

53. Comment from Save the Bay

Section 2.3.7.b.ii.3. For all the reasons noted above, "does not cause or contribute to a violation of water quality standards" should be reinstated and "meets applicable water quality standards" (as defined in the permit) should be removed.

EPA Response to Comments 52 - 53

See EPA Response to Comments 13 -15.

Part 4.1

54. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

Maintain the original language in this section,

"EPA or MassDEP may require the permittee to add, modify, repair, replace or change BMPs or other measures described in the annual reports as needed to satisfy the conditions of this permit.

To address impacts to receiving water quality caused or contributed to by discharges from the MS4; or

To satisfy conditions of this permit

Any changes requested by EPA or MassDEP will be in writing and will set forth the schedule for the permittee to develop the changes and **will** offer the permittee the opportunity to propose alternative program changes to **meet the objective of the requested modification**."

The proposed language for this section weakens the intent of the permit. Under the proposed change, EPA can only request, not require, changes or additions to BMPs to satisfy permit conditions during the permit term. While EPA could take enforcement action where warranted and thereby specify additional BMPS, this seems extremely unlikely given EPA's scarce staffing for the stormwater program. The language should be amended and returned to its original state to prevent weakening of the permit.

55. Comment from Save the Bay:

Section 4.1.c. This section weakens the authority of EPA and, consequently, the protection afforded to receiving waters. The word "require" should be retained and the proposed addition of "request" deleted. Further, the two deleted bullets should be maintained to require a modification of BMPs "to address impacts to receiving water quality caused or contributed to by discharges from the MS4; and "to satisfy conditions of this permit." There is no reasonable need to limit EPA's authority given the great deal of discretion that it has in the administration of MS4 permits.

EPA Response to Comments 54 - 55

The modifications to this Part do not change the requirement that permittees must satisfy the conditions of the permit in order to remain in compliance with the Permit. All permittees must select BMPs to satisfy the terms and conditions of this Permit. If EPA or MassDEP become aware of a permittee that has selected BMPs that do not meet the terms and conditions of the permit, EPA or MassDEP may notify the permittee in writing that a new BMP may be necessary to meet the permit terms and conditions. The permittee would remain out of compliance with the permit until the permittee selects appropriate BMPs that satisfy the terms and conditions of the permit.

Part 4.4

56. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

We recommend the following changes:

Same comment as Section 2.1. The proposed modification, "meet applicable" weakens the intent of this section and should be corrected to "cause or contribute to an exceedance of."

57. Comment from Save the Bay:

Section 4.4.b.ii Once again, the new language weakens protection of receiving water body by deleting "causing or contributing to an exceedance" and the original language should be reinstated.

EPA Response to Comments 56 - 57

See response to comments 13-15 regarding EPA's reasoning for modifying the permit to say "meet applicable water quality standards" instead of "cause or contribute to an exceedance of water quality standards." EPA is finalizing the change to 4.4.b.ii as proposed.

Part 5.1.5

58. Comment from the Massachusetts Department of Conservation and Recreation:

5.1.5 Dischargers Subject to Appendix F Part A.I We support the proposed change that non-traditional MS4s that discharge to a waterbody in the Charles River watershed can coordinate with the municipality they are located within to comply with the phosphorus reduction target applicable to the municipality. We request clarification that this language is not relevant for DCR since DCR has their own pollutant removal targets separate from the municipalities in the Charles River watershed. We anticipate collaborating with the communities but since we have our own targets will need to focus on meeting those instead of spending time providing the information to the municipalities by Year 4 as required in this section.

EPA Response to Comment 58

EPA appreciates the support and has updated the permit language to clarify that this is not applicable to DCR since DCR has its own phosphorus reduction requirements, as indicated in Appendix F Part A.I of the permit.

Part 6.5

59. Comment from the Massachusetts Department of Conservation and Recreation:

6.5 Dischargers Subject to Appendix F Part A.1 Non-Traditional Permittees Similar to the above comment, please clarify that the phosphorus removal targets specifically set for DCR property in the permit are separate from the municipality's targets, and that DCR is not subject to this requirement.

EPA Response to Comment 59

EPA updated the permit language to clarify that Part 6.5 is not applicable to DCR since DCR has its own phosphorus reduction requirements, as indicated in Appendix F Part A.I of the permit.

Appendix A

Appendix F

Appendix F Part A.I

60. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix F.A.I.1.a Charles River Phosphorus TMDL Nonstructural Control Implementation Schedule The schedule indicates a change for when the full implementation of nonstructural controls is due from Permit Year 6 to Permit Year 5. We advise EPA to keep the implementation of these controls to Permit Year 6. Permittees need time to implement these controls and revise

contracts and maintenance budgets to allow for implementing these controls in an effective manner.

61. Comment from MassDOT:

Appendix F.A.I.1.a Charles River Phosphorus TMDL Nonstructural Control Implementation Schedule The schedule indicates a change for when the full implementation of nonstructural controls is due from Permit Year 6 to Permit Year 5. We advise EPA to keep the implementation of these controls to Permit Year 6. Permittees need time to implement these controls, revise contracts and maintenance budgets to allow for implementing these controls in an effective manner.

EPA Response to Comments 60 - 61

Unlike structural stormwater controls, non-structural stormwater controls do not require complex engineering plans and construction. As such, five years represents an adequate amount of time for permittees to plan for the implementation of non-structural controls and it is reasonable to assume that non-structural controls can be implemented at the same time the plan for implementation is finalized. Thus, EPA is not inclined to return the implementation schedule to six years from the permit effective date.

62. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix F.A.I.1.a.3, b.3 and c.3 Charles River Phosphorus TMDL Phosphorus Control Plan Components Phase 1 -3 Schedule We support the ability to request an alternative schedule for implementation of each phase of the Charles River PCP if meeting the phase reductions are impracticable. By allowing a permittee to submit an Alternative Schedule Request, DCR is given flexibility to implement projects most effectively for all of the Department's goals and using taxpayer dollars smartly. It makes good fiscal and environmental policy to allow a permittee to extend a schedule to account for situations such as when a large capital project is occurring in the near future, but outside of the phase's timeframe, which would allow for significant pollutant reduction.

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

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

64. Comment from MassDOT:

Appendix F.A.I.1.a.3; F.A.I.1.b.3; and F.A.I.1.c.3 Charles River Phosphorus TMDL Phosphorus Control Plan Components Schedule We support the ability to request an alternative schedule for implementation of each phase of the Charles River PCP if meeting the phase's reduction targets are impracticable. By allowing a permittee to submit an Alternative Schedule Request, the permittee is given flexibility to implement projects most effectively for all town goals and use of taxpayer dollars (including those from MassDOT funding). It makes good fiscal and

environmental policy to allow a permittee to extend a schedule to account for situations such as when a large capital project is occurring soon, but outside of the phase's timeframe, which would allow for significant pollutant reduction.

EPA Response to Comments 62 - 64

EPA appreciates the support for the modifications in this Part.

65. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix F.A.I.1.a.3 Charles River Phosphorus TMDL Phosphorus Control Plan Load Reduction Targets We understand the targets for the municipalities have been increased to remove the presumptive IDDE credit given in the 2016 version of the permit. While EPA has indicated that there is the chance that the IDDE credit will be given once IDDE programs are fully implemented (10-year schedule), we are concerned that permittees are not receiving credit for the significant investment into catchment investigations, sampling, identification and removal. We were originally concerned that DCR was not receiving the same credit in the 2016 permit for the implementation of the same IDDE program in our targets. We argue that these IDDE credits should be reinstated for the municipalities and that DCR should be provided this same credit as the municipalities. Permittees will have a hard time prioritizing spending on this program if credit is only a potential sometime in the future and may end up building structural BMPs that are not needed to meet the target since targets could have been met through non-structural controls including IDDE.

66. Comment from the Massachusetts Rivers Alliance, the Neponset River Watershed Association:

We support the adjustments to the required P reductions in Appendix F Tables 2 and 3. These values have been appropriately adjusted to reflect the actions that municipalities need to take to reduce phosphorus loading to the Charles River to address the significant water quality issues currently being caused by nutrient pollution. Communities should receive reduction credits only after actions, such as structural and non-structural controls and removal of illicit connections, are taken and verified.

67. Comment from MassDOT:

Appendix F.A.I.1.a.3 Charles River Phosphorus TMDL Phosphorus Control Plan Load Reduction Targets We understand the municipal phosphorus targets have been increased to remove the presumptive IDDE credit given under the original draft permit. While EPA has indicated that there is a chance that credits will be given once IDDE programs are fully implemented (10-year schedule), we are concerned that municipalities are not receiving credit for the significant investment into catchment investigations, sampling, identification and removal. EPA has said multiple times that illicit discharges are a significant contributor to water quality impairments within the Charles River watershed and thus programs that address this issue should receive full credit. We were originally concerned that non-traditional permittees like DCR and MassDOT were not receiving the same credit for implementation of IDDE programs in their targets. We argue that all permittees, municipalities and non-traditional, should be allowed credit for removing illicit discharges from their MS4 as they are found and eliminated. MassDOT supports

the approach to allow permittees to provide calculations to show phosphorus removal based on the specific conditions of the illicit discharge that is removed (these calculations could be included in the permittee's phosphorus control plan). This allowance would prevent diverting a stormwater program's limited budget away from more cost-effective pollutant reduction measures.

EPA Response to Comments 65 - 67

As discussed in the Statement of Basis for the proposed permit modifications, EPA will recalculate the watershed-wide phosphorus reduction due to IDDE implementation by all permittees following completion of each permittee's IDDE program (10 years after the permit effective date). The watershed-wide phosphorus reduction realized through IDDE implementation will then be distributed among the permittees to reduce each permittee-specific required phosphorus reduction target following IDDE program completion. This approach will more accurately reflect the phosphorus load reduced watershed wide from removal of illicit discharges. EPA agrees that any future reduction in permittee obligations should also be afforded to MassDOT and MassDCR. EPA does not agree, however, that these presumptive credits should be reinstated now, or that the removal of the presumptive credit will disincentivize permittees to complete IDDE programs. On the contrary, the potential to get credit for IDDE work in future permit terms to reduce total phosphorus obligations should act as an incentive to complete IDDE work as quickly as possible in order to realize this credit. Any future phosphorus reduction credit for IDDE work will be spread equally across the watershed based on all permittees' IDDE implementation and will not be permittee-specific. In other words, permittees will not be given an IDDE credit that is specific to the work they themselves have done but will be based on the overall total phosphorus reduction realized in the Charles River Watershed based on the work of all permittees.

Appendix F Part A.II

68. Comment from the Association to Preserve Cape Cod, the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

EPA, not the permittee, should make the determination whether meeting the Phosphorous (P) reduction milestone is "impracticable." This language should be amended to make clear that EPA is responsible for making this determination and describe what metrics EPA will be using to determine impracticability.

As noted in Footnote 25, "**Alternative Schedule Request package must be made available to the public consistent with 2.3.3. of the permit.**" As stated in our earlier comments on 2.3.3, the language in this section should be strengthened to carry out the stormwater program's intent and minimum measures for public involvement. Notice and access are critical for meaningful public involvement and participation. The requirement should be to post and conspicuously

publicize the availability of documents on the permittee's website unless website posting is infeasible. At a minimum, the permittee should be required to explain why it cannot post to its own website. The language should also be amended to clarify what "other website" may entail.

Notifications should be sent to local watershed organizations and interested parties that an ASR has been filed within 24 hours of filing. EPA should be responsible for the notifications at each stage (at the ASR filing, determination of completeness etc.). There should be an opportunity for the public to submit comments at each stage of the process.

EPA should amend the current language in Appendix F to make explicit that ASR's should only be used very sparingly and only when a permittee has used their best efforts to achieve each P reduction. Importantly, as EPA recognizes in Footnote 27, EPA will consider the extent of P reductions at the time of the ASR request. A permittee that is out of compliance with their permit or requirements of Appendix F should be subject to enforcement and treatment since an ASR would not be appropriate.

The P reduction milestone at year eight in the permit (20 percent) is overly generous. Most of the P reductions are permit back-ended and the language in this section should be amended to reflect that and prevent a weakening of the intent of the permit.

EPA Response to Comment 68

As discussed in the Statement of Basis for the proposed permit modifications, the ASR process contains a requirement that the applicant post the ASR for the public to view, an initial EPA completeness review, and a public comment period on any ASR provisions EPA proposes to approve under the permit. This process builds in an important review step for EPA to determine if the ASR is warranted before approving it. It also builds in a required public comment process on any proposed ASR. EPA finds that this process builds in adequate review periods for EPA and adequate public review consistent with 40 C.F.R. § 124.10. See also EPA's Statement of Basis for the proposed modifications.

As stated in the Statement of Basis for the proposed permit modifications, EPA expects that the need to request an alternative schedule would happen rarely, and thus EPA is not inclined to add this text to the permit.

While EPA agrees that the total phosphorus milestones are back ended, this was done intentionally to allow for the implementation of a well thought out program and allow adequate time for permit holders to ramp up their phosphorus reduction programs. See the Fact Sheet to the 2014 Draft MA MS4 Permit pp 31-41 for a detailed discussion of the phased phosphorus control plan approach.

69. Comment from the Association to Preserve Cape Cod:

APCC is appreciative of, and supports, the following revisions in the permit:

There is no grace period for complying with existing milestones when the permittee files an Alternative Schedule Request (ASR).

The Alternative Schedule Request and new milestones become enforceable permit conditions.

There is no constructive approval of an ASR request if EPA fails to act on an ASR request within 90 days of the close of the public comment period. Constructive approval would be far too drastic. Given that EPA is now allowing ASR relief, the agency should have the ability to extend the review time, if necessary, for its considered review.

70. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix F.A.II.1.i.c Lake and Pond Phosphorus TMDL Phosphorus Control Plan Components Schedule We support the ability to request an alternative schedule for implementation of the Lakes and Ponds PCP if meeting the reductions within the schedule is determined to be impracticable. By allowing a permittee to submit an Alternative Schedule Request, DCR is given flexibility to implement projects most effectively for all of the Department's goals and using taxpayer dollars smartly. It makes good fiscal and environmental policy to allow a permittee to extend a schedule to account for situations such as when a large capital project is occurring in the near future, but outside of the phase's timeframe, which would allow for significant pollutant reduction.

71. Comment from MassDOT:

Appendix F.A.II.1.i.c Lake and Pond Phosphorus TMDL Phosphorus Control Plan Components Schedule We support the ability to request an alternative schedule for implementation of the Lakes and Ponds PCP if meeting the reductions within the schedule is determined to be impracticable. By allowing a permittee to submit an Alternative Schedule Request, the permittee is given flexibility to implement projects most effectively for all town goals and use of taxpayer dollars (including those from MassDOT funding). It makes good fiscal and environmental policy to allow a permittee to extend a schedule to account for situations such as when a large capital project is occurring soon, but outside of the phase's timeframe, which would allow for significant pollutant reduction.

Additionally, we support the language in the Alternative Schedule Request requirements which encourages entities to explore third party partnerships for meeting the pollutant removals *(Appendix F.A.II.1.i.c.a Suitability and availability of areas for siting and constructing structural controls, including, if appropriate, a review of third-party partnerships considered for within-watershed structural control sites)*. It is likely that entities, including MassDOT, will need to partner on BMP construction and maintenance and share a percentage of removal reduction credit in order to meet the target removals.

72. Comment from the Massachusetts Rivers Alliance, the Neponset River Watershed Association, the Nashua River Watershed Association, the Taunton River Watershed Association, the Ipswich River Watershed Association, and the North and South Rivers Watershed Association:

We support the following revisions:

We appreciate that EPA has maintained that there should be no grace period for complying with existing milestones when the permittee files an Alternative Schedule Request (ASR).

We appreciate that EPA has maintained that the Alternative Schedule Request and new milestones become enforceable permit conditions.

We appreciate that EPA has maintained that there should not be constructive approval of an ASR request if EPA fails to act on ASR request within 90 days of the close of the public comment period. Constructive approval would be far too drastic. Given that EPA is now allowing ASR relief, the agency should have the ability to extend the review time, if necessary, for its considered review.

EPA Response to Comments 69 - 72

EPA appreciates the support for the modifications in this Part.

73. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix F.A.II.1 Lake and Pond Phosphorus TMDL Requirements The target reductions for Flint Pond and Lake Quinsigamond are different for Grafton versus Shrewsbury. In other towns where the lake spans more than one town (e.g., Lake Boon between Hudson and Stow) the percent removal is the same. Please clarify why the removal targets are different for Flint Pond and Lake Quinsigamond in these towns since DCR has facilities within the Flint Pond and Lake Quinsigamond watersheds.

EPA Response to Comment 73

EPA updated the typographical error in Table F-6 of Appendix F. Grafton and Shrewsbury have the same required percent reduction of 49% for phosphorus from urban stormwater sources for Flint Pond and Lake Quinsigamond.

Appendix F Attachment 3

74. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix F Attachment 3: Biofiltration Phosphorus reduction maximum was reduced (Table 3-18) We understand and support that EPA is committed to using the best available science for stormwater control measure crediting. We continue to support the allowance for presentation of alternative methods, especially nonstructural measures, and consideration for use in crediting. If credits are lowered over the course of the PCP planning and implementation timeline, this could significantly alter the ability for a permittee to meet required targets. EPA should allow flexibility in meeting future targets if crediting approaches are altered. Likewise, we ask that additional controls and crediting approaches that are acceptable for TMDL compliance in other states and regions (e.g., Chesapeake Bay) be available for permittees to allow more flexibility in implementation strategies.

75. Comment from MassDOT:

Appendix F Attachment 3: Biofiltration Phosphorus reduction maximum was reduced (Table 3-18) We understand and support that EPA is committed to using the best available science for stormwater control measure crediting. We continue to support the allowance for presentation

of alternative methods, especially nonstructural measures, and consideration for use in crediting. If credits are lowered over the course of the PCP planning and implementation timeline, this could significantly alter the ability for a permittee to meet required targets. EPA should allow flexibility in meeting future targets if crediting approaches are altered. Likewise, we ask that additional controls and crediting approaches that are acceptable for TMDL compliance in other states and regions (e.g., Chesapeake Bay) be available for permittees to allow more flexibility in implementation strategies.

EPA Response to Comments 74 - 75

EPA remains committed to using the best available science to inform pollution reduction credits for both structural and non-structural practices. This commitment is necessary to ensure the waterbodies with applicable TMDLs and associated permit requirements lead discharges to meet water quality standards and be consistent with TMDL WLAs. However, this means that in future MA Small MS4 general permits, total phosphorus reduction credits may fluctuate. EPA disagrees that the fluctuation "could significantly alter the ability for a permittee to meet required targets," however, if that were the case, EPA could adjust schedules in future permits to accommodate for the fluctuations. It is important that each permittee subject to a TMDL WLA use the same crediting scheme for fairness and consistency across the watershed and EPA is not inclined to allow permittees to calculate their own reduction estimates based on reduction credits in other permits throughout the country. The credits for stormwater controls in the MA MS4 permit have been calibrated to New England climate and runoff data. EPA is committed to increasing the number of practices available for credit as information becomes available and will do so in future permit reissuances.

Appendix H

76. Comment from the Massachusetts Department of Conservation and Recreation:

Appendix H I.2, II.2, III.2, V.2 SWMP Update to Address Impaired Waterbody Limited for Nitrogen; Phosphorus; Bacteria or Pathogens; and Solids, oil and grease (hydrocarbons), or metals We are concerned that permittees will be required to update their SWMP within 90 days of EPA or MassDEP notification of additional waterbodies being listed as impaired for any of these pollutants. It is our understanding from the EPA webinars that permittees will not be formally notified that the status of one of the waterbodies has changed and instead the posting of the updated 303d list by MassDEP will be considered notification. The 303d lists are not finalized nor issued on a predictable schedule. For example, the 2016 was just recently finalized and the 2018 is still draft. Ninety days is a very short timeframe for making such changes and the necessary operational changes associated with the requirements even if a permittee happened to check the MassDEP website on the day it was revised. Permittees should be formally notified of the changes and at least 180 days should be given to make changes.

EPA Response to Comment 76

See EPA Response to Comments 27 -29

It is unclear why the commenter believes three months is too short a time to update their SWMP after notification of a new EPA-approved Section 303(d) list. Permittees have 90 days (three months) to review the new Section 303(d) list and update the SWMP to address new impairments and delistings.