



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

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ENVIR. APPEALS BOARD

Lori G. Kier  
Senior Assistant Regional Counsel

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December 10, 2009

Via Overnight Delivery

Ms. Eurika Durr  
U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

In Re: Antrim Township, Pennsylvania  
Docket No. CWA-03-2009-0265DN  
Appeal No. NPDES 09-14

Dear Ms. Durr

Enclosed please find the original and five copies of the following documents in the above-captioned matter:

1. Notice of Appearance;
2. Motion to Dismiss Petition for Review and Memorandum in Support Thereof;  
and
3. Motion to Extend the Deadline for Filing Response to Petition and Certified Index of Administrative Record, and proposed Order granting same.

Sincerely,

Lori G. Kier

cc: Linus E. Fenicle, Esq.

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U.S. EPA.

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

In Re:

Antrim Township  
10655 Antrim Church Road  
Greencastle, PA 17225-9577

Appellant.

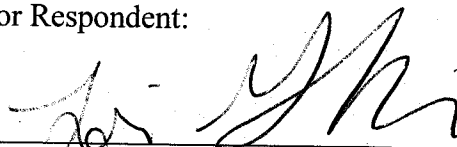
Docket No. CWA-03-2009-0265DN  
Appeal No. NPDES 09-14

NOTICE OF APPEARANCE

NOW COMES Lori G. Kier, Senior Assistant Regional Counsel, U.S. EPA Region III,  
and enters this appearance on behalf of the Respondent, U.S. EPA in the above-captioned matter.

Respectfully submitted this 10<sup>th</sup> day of December, 2009.

For Respondent:



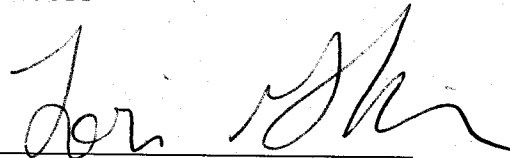
Lori G. Kier  
Senior Assistant Regional Counsel  
EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I filed the original and five copies of the foregoing Notice of Appearance with the Clerk of the Environmental Appeals Board by facsimile and U.S. mail. Moreover, I hereby certify that on the same date I sent a copy of the foregoing document to the party below by First Class certified mail, return receipt requested:

Linus E. Fenicle, Esq.  
Wayne S. Martin, Esq.  
Reager & Adler, P.C.  
2331 Market Street  
Camp Hill, PA 17011

Dated: 12/10/09



Lori G. Kier  
Senior Assistant Regional Counsel  
EPA Region III (3RC20)  
1650 Arch Street  
Philadelphia, PA 19103  
(215) 814-2656

**In Re:**

**Appellant.**

Docket No. CWA-03-2009-0265DN  
Appeal No. NPDES 09-14

NOW COMES Lori G. Kier, Senior Assistant Regional Counsel, U.S. EPA Region III,  
and enters this appearance on behalf of the Respondent, U.S. EPA in the above-captioned matter.

Respectfully submitted this 10<sup>th</sup> day of December, 2009.

**For Respondent:**

Lori G. Kler  
Senior Assistant Regional Counsel  
EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103


07-09-11 AM 9:26

The Region is filing a Motion to Dismiss concurrent with the instant Motion for Stay of Proceedings and Extension of Time. If granted, that Motion will resolve the appeal in its entirety and moot the need for a Response to the Petition.

The Region has contacted counsel for the Petitioner, Linus Fenicle, Esq., to determine whether the Petitioner objects to this Motion. Mr. Fenicle indicated that he had no objection to an extension of time to allow the Board to rule on the Region's Motion to Dismiss.

Respectfully submitted this 10<sup>th</sup> day of December 2009

For Respondent:

  
\_\_\_\_\_  
Lori G. Kier  
Senior Assistant Regional Counsel  
EPA Region III

ORDER GRANTING JOINT FOR STAY  
OF PROCEEDINGS AND EXTENSION OF TIME

For good cause shown, the Region's Motion for Extension of Time is hereby granted, and the matter is stayed pending the Board's ruling on the Region's Motion to Dismiss. The Region shall file its Response to the Petition and administrative record no later than 30 days following issuance of the Board's decision on the Region's Motion to Dismiss.

So ordered.

Dated: \_\_\_\_\_

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_

Environmental Appeals Judge

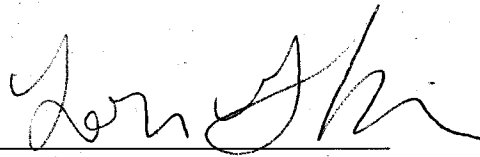
CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I filed the original and five copies of the foregoing Motion for Stay of Proceedings and Extension of Time with the Clerk of the Environmental Appeals Board by facsimile and U.S. mail. Moreover, I hereby certify that on the same date I sent a copy of the foregoing document to the party below First Class certified mail, return receipt requested:

Linus E. Fenicle, Esq.  
Wayne S. Martin, Esq.  
Reager & Adler, P.C.  
2331 Market Street  
Camp Hill, PA 17011

Dated: \_\_\_\_\_

12/10/09



Lori G. Kier  
Senior Assistant Regional Counsel  
EPA Region III (3RC20)  
1650 Arch Street  
Philadelphia, PA 19103  
(215) 814-2656



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RIVER. APPEALS BOARD

Docket No. CWA-03-2009-0265DN  
Appeal No. NPDES 09-14

On December 6, 2002, the Pennsylvania Department of Environmental Protection (“PA DEP” or “DEP”) issued its National Pollutant Discharge Elimination System (“NPDES”) General Permit (“PAG-13” or “Permit”), Stormwater Discharges from Small Municipal Separate

Storm Sewer Systems ("MS4s"), effective December 7, 2002 (Exhibit 1 hereto). *See* 32 Pa. Bulletin 5999 (December 6, 2002). On January 28, 2005, Antrim signed and submitted a notice of intent ("NOI") for coverage under the Permit (Exhibit 2 hereto).<sup>1</sup> The NOI indicated that the Township discharged into unnamed tributaries of the following waterbodies: Conococheague Creek, Marsh Run West Branch and Marsh Run. On May 12, 2005, PA DEP issued an Approval of Coverage ("DEP Approval of Coverage") to the Township, NPDES Permit No. PAG 133705 (Exhibit 3).

The Permit requires that a small MS4s, like Antrim (at least based on its NOI), perform a number of activities, including, *inter alia*, the submission of annual reports to PA DEP on stormwater management activities performed during the previous year. *See* Exhibit 3 at 12 ("The permittee must submit annual reports to DEP on June 9th of 2004-2008 to report on stormwater management program activities performed during the permit year ending March 9th of each year.").

On June 9, 2009, the Region conducted a review of Antrim's files located at PA DEP offices. Because the files did not contain any of the five annual reports required by the Permit, the Region issued an Administrative Order and Information Request to the Township on September 30, 2009 ("Order and Information Request," Exhibit 4 hereto). The Order and Information Request required that Antrim perform, *inter alia*, the following: (1) submit complete annual reports for the missing years; and (2) provide the ordinances that were developed to comply with the minimum control measure for post-construction site runoff control. Exhibit 4 at para. 22, p. 4. The Order and Information Request did not assess any

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<sup>1</sup> Antrim continues to be covered under the permit that issued in 2003. The Permit was initially extended for 12 months, *see* 38 Pa. Bulletin 4679 (August 23, 2008), and was scheduled to expire on March 9, 2010. A second extension will be effective on March 10, 2010, and will expire on March 9, 2011. *See* 39 Pa. Bulletin 4953 (August 15, 2009).

penalty. The cover letter transmitting the Order and Information Request urged the Township to contact the Region if it required any assistance or information regarding the Order and Information Request. Antrim submitted a response to the Administrative Order and Information Request on October 28, 2009. (Exhibit 5).

On October 29, 2009, Antrim filed the instant Petition with the Board. The Petition does not cite a regulatory basis for invoking the Board's appellate authority. The Petition was docketed, however, as an NPDES permit appeal.

#### MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Petition should be dismissed because the Board does not have jurisdiction to adjudicate pre-enforcement administrative compliance orders. In the alternative, to the extent that the Board might consider this appeal to be a petition for review of the Permit itself, as opposed to a challenge to the Order and Information Request, the Board does not review state-issued NPDES general permits. Finally, the Board should not exercise its discretion to review this matter absent the factual record that would be developed should the Region escalate the enforcement response and elect to pursue administrative penalties or judicial enforcement.

##### 1. The Petition Should be Dismissed for Lack of Jurisdiction

Though the Petition cites no basis for the Board's review, the Board does have regulatory to review penalty orders issued by Regions under section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). See 40 C.F.R. §§ 22.1,<sup>2</sup> 22.29 and 22.30. However, those duties do not extend to the authority to review an administrative order that does not assess penalties. The Part 22 regulations at 40 C.F.R. § 22.29 provide for interlocutory review at the

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<sup>2</sup> Section 22.1 provides that "(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for: . . . [t]he assessment of any Class II penalty under section[ ] 309(g) . . . of the Clean Water Act, as amended (33 U.S.C. 1319(g)). . . .

discretion of the Board (as well as Board review of an initial decision at 22 C.F.R. § 22.30), but interlocutory review is necessarily predicated on the initiation of a proceeding by the Region. 40 C.F.R. § 22.14. The Region has not done so in this matter. It is a fundamental principle of administrative law that pre-enforcement judicial review is inappropriate given the nature of escalating enforcement responses and structure of environmental statutory provisions governing judicial review.<sup>3</sup> Because EPA regulations do not specify a basis for pre-enforcement review of administrative orders directing compliance but not imposing penalties, *cf.* 40 C.F.R. § 22.4(a) (powers and duties of Board), the Board should likewise reject the opportunity for pre-enforcement review of the Antrim Petition.

The instant situation, in which the Region has issued an administrative compliance order, contrasts to circumstances where a Region initiates action to enforce an administrative compliance order by escalating the enforcement response to an administrative penalty order or through a judicial action. In those circumstances, an aggrieved recipient of such an order can in fact challenge the enforcement in the forum in which the Region brings the action – either before an administrative law judge or before a federal District Court judge, depending on the forum. Unless and until CWA enforcement has so escalated, review is not available, either by the Board or by an Article III court.

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<sup>3</sup> *Thunder Basin Coal v. Reich*, 510 U.S. 200 (1994) (Where statute's structure includes judicial review, Congress does not intend to allow challengers to evade statutory-review process); *see also, e.g., Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1995) (administrative cease and desist order to prevent brine discharges to salt playa not reviewable in federal court because of lack of subject matter jurisdiction (no pre-enforcement review)); *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993) (no pre-enforcement review of 309(a) order requiring respondent to remove fill from wetland; "[I]f Agency compliance orders are not reviewable until the enforcement stage, an agency's initial determination that it has the authority to either require permitting or issue orders in the absence of a permit application must also be unreviewable."); *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990) (no pre-enforcement review of section 309(a) order issued to wetlands violator: "The structure of these environmental statutes indicates that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation."); *Lakewood Development, LLC v. USACOE*, 2008 U.S. Dist. LEXIS 96466 (E.D. La. August 8, 2008) (on motion to dismiss, plaintiff not entitled to pre-enforcement review of Corps decision that permit does not apply to parcel in question).

2. Alternatively, to the Extent that the Board Construes the Petition as a Challenge to the General Permit, the Petition Should be Dismissed.

The Permit according to which Antrim filed an NOI was not an individual permit, but rather an NPDES General Permit issued by PA DEP, which is authorized to administer the NPDES permitting program in lieu of the Region. While the Region does not consider the instant Petition to be a challenge to the Permit itself, but rather to the Region's issuance of the Order and Information Request, Board review of the Permit at this point is inappropriate for two reasons: (a) The Board does not have jurisdiction to review general permits, much less any permit issued by an authorized state; and (b) review of the Permit would be untimely.

a. The Board Does Not Have Jurisdiction over State-Issued General Permits

To the extent that the Board would construe the Petition as a challenge to the Permit issued by Pennsylvania, the Board is not the correct forum for such a challenge. Applicable regulations specify that the Board will not review a general permit. See 40 C.F.R. § 124.19(a) ("Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of the general permit in further Agency proceedings. They may, instead, either challenge the general permit in court, or apply for an individual NPDES permit for any discharger eligible for authorization to discharge under an NPDES general permit."). More importantly, however, the Board does not review any state-issued permits, general or individual. Review of a state NPDES permit lies in a state forum. 40 C.F.R. § 123.30; *see also, In re: Michigan CAFO General Permit*, NPDES Appeal No. 02-11 (March 18, 2003) (Board does not have authority to review state-issued or general NPDES permits). As to the individual permit option, the Permit contains a provision allowing dischargers to apply for an individual permit. Attachment 1 at 3. ("Individual Permits. DEP may require any MS4 operator

authorized by this General Permit to apply for and obtain an individual NPDES permit. Any interested person may petition DEP to take action under this paragraph.”).

In addition to seeking review in an appropriate state court or applying for an individual permit, Antrim could have sought to modify its permit under the Pennsylvania analogue to 40 C.F.R. § 122.62 (permit modification) (applicable to state NPDES programs by virtue 40 C.F.R. § 123.25(a)(22)), or requested a waiver under the Pennsylvania analogue to 40 C.F.R. § 123.35 (applicable to state NPDES programs by virtue of 40 C.F.R. § 123.25(a)(44)) and procedures identified by PADEP in connection with PAG-13.

Petitioner’s failure to pursue its dissatisfaction with the terms of the Permit coverage in the correct forum should not serve as a basis for the Board to exercise any discretionary power of review that it may have.

b. Appeal of the General Permit Would Be Untimely

The Petitioner, along with all members of the public, had a 30-day opportunity to challenge that General Permit, *see* 32 Pa. Bulletin 5999 (December 6, 2002); Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511 – 7510; 25 Pa. Code § 1021.52(a)(1), but there is no evidence that it chose to do so in that timeframe. Also, the May 12, 2005 cover letter submitting the DEP Approval of Coverage, Attachment 3 hereto, specifically notified the Township that it had 30 days to appeal its DEP Approval of Coverage to the Pennsylvania Environmental Hearing Board. Antrim has not presented any evidence that it challenged either the Permit in 2002, or DEP Approval of Coverage in 2005. Therefore, the Township’s 2009 Petition, to the extent it challenges the Permit or the DEP Approval of Coverage, would be untimely – even if the Board did have jurisdiction to review the Permit.

3. The Board Should not Exercise Any Discretionary Review since the Petition Alleges Questions of Fact Over Which the Parties Have Not Developed an Administrative Record.

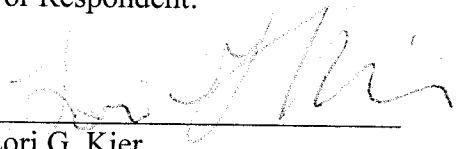
The Petition for Review includes only one exhibit – the Order and Information Request transmitted by the Region under the authority of CWA section 309(a). Although the Petition states that the Township does not have a “point source,” and thus does not need permit coverage, there is no factual support to confirm or refute that allegation. Given the Township’s identification of receiving waterbodies in its NOI, PADEP had a sufficient basis for the DEP Approval of Coverage to authorize discharges under the Permit. If the Township has altered its separate storm sewer system, it can and should have notified PA DEP of that alteration and sought a modification to the terms of its Permit authorization. To order compliance under CWA section 309(a), the Region is not required to bear a burden of factual proof before the Board to demonstrate an “addition of any pollutant” from a “point source” to “waters of the United States” from a municipality that sought authorization to discharge under a general permit unless and until the Region escalates its enforcement response. If and when the region escalates its enforcement response, contested issues of fact would be adjudicated and incorporated into an administrative record fro the Board’s appellate “review.” Absent such an administrative record, the Board should not exercise any discretionary power to review the Petition.

CONCLUSION

For the reasons above, the Region respectfully requests that the Board dismiss the Township's Petition for Review.

Respectfully submitted this 11 day of December, 2009.

For Respondent:

  
\_\_\_\_\_  
Lori G. Kier  
Senior Assistant Regional Counsel  
EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103

Of Counsel:

Stephen J. Sweeney  
EPA Office of General Counsel (Mail Code 2355A)  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460



## TABLE OF ATTACHMENTS

<u>Attachment</u>	<u>Title</u>	<u>Date</u>
1	PADEP, NPDES General Permit (PAG-13), Stormwater Discharges from Small MS4s	December 6, 2002
2	Antrim Township, Notice of Intent for Coverage Under PAG-13	January 28, 2005
3	PADEP, Approval of Coverage	May 12, 2005
4	EPA Region 3, Administrative Order for Compliance	September 30, 2009
5	Antrim, Response to Administrative Order and Information Request	October 28, 2009



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
BUREAU OF WATERSHED MANAGEMENT

## AUTHORIZATION TO DISCHARGE

### UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

### GENERAL PERMIT FOR DISCHARGES OF STORMWATER FROM SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS

## PAG-13

In compliance with the provisions of the Clean Water Act, 33 U.S.C. Section 1251 *et seq.*, Pennsylvania's Clean Streams Law, *as amended*, 35 P.S. Section 691.1 *et seq.*, and 25 Pa. Code Chapter 92, the Department of Environmental Protection (DEP) will authorize eligible dischargers of stormwater from small municipal separate storm sewer systems (MS4s), as defined in 40 CFR 122.26(b)(16), that are required under the federal stormwater regulations (40 CFR Part 122.26 - 123.35) and state regulations incorporating those federal requirements by reference (25 Pa. Code §92.2), to submit an application and obtain an NPDES permit to discharge stormwater into surface waters of the Commonwealth of Pennsylvania.

The authorization to discharge stormwater is subject to the terms and conditions set forth in Parts A, B and C herein. This permit authorizes discharges that are composed entirely of stormwater as defined in this General Permit from small municipal separate storm sewer systems (MS4s) to surface waters of the Commonwealth, except as otherwise provided herein.

Operators of MS4s discharging to waters classified as "Special Protection" under 25 Pa. Code Chapter 93 may not apply for or obtain coverage under this General Permit. They must seek coverage under an "individual" permit. Other eligibility requirements apply, as described herein.

Operators of MS4s that meet the eligibility requirements of this General Permit and submit a timely and administratively complete and acceptable Notice of Intent (NOI) to DEP, are authorized to discharge stormwater to surface waters of the Commonwealth under the terms and conditions of this permit, upon approval by DEP, except as otherwise provided herein.

DEP may deny coverage under this permit and require submittal of an application for an individual NPDES permit based on a review of the NOI or other information.

### NOTICE OF INTENT REQUIREMENTS

**Deadlines for NOI Submittal** — Operators of MS4s that wish to obtain coverage (that are eligible for coverage under this General Permit) must file an administratively complete and acceptable NOI no later than March 10, 2003, and must submit an NOI to be covered under the next permit 180 days prior to permit expiration.

**Contents of Notice of Intent** — The NOI must be signed in accordance with the signatory requirements of this permit and must include all applicable information specified on the NOI form and in the instructions for completing the form, including a schedule, BMPs and measurable goals for developing a stormwater management program and names of responsible parties. Applicants who elect to implement the *Protocol* in its entirety do not need to include a schedule, BMPs and measurable goals because they are already included in the *Protocol*. If the applicant chooses to develop and implement its own program in whole or in part to meet the Minimum Control Measures rather than follow the *Protocol*, then additional materials will need to be submitted to DEP for approval. See the Notice of Intent Instructions, Part A of this Permit and the Fact Sheet for more information.

**Where to Submit** — NOIs must be submitted to the appropriate regional office of DEP. Addresses for regional offices are provided in the NOI Instructions.

**DEP Review/Approval** — DEP will review all NOIs prior to approval. NOIs in which the applicant will implement all six components of the DEP Stormwater Management *Protocol* are deemed approved 60 days after submittal of the administratively complete NOI (unless DEP indicates otherwise prior to that date).

For NOIs in which the applicant will develop and implement some or all of its own six minimum controls measures (i.e., will not follow the *Protocol* in its entirety), DEP will review the proposed stormwater management program. DEP will decide on the authorization to proceed under the proposed stormwater management program; in addition, the proposed program is subject to DEP approval.

Incomplete or deficient NOIs will be addressed using DEP standard permit review/approval process.

## APPLICABILITY AND LIMITATIONS ON COVERAGE

This General Permit does not authorize stormwater discharges under this permit when one or more of the following conditions exist:

1. The stormwater discharge(s) originates from anything other than a small MS4 as defined in 40 CFR 122.26(b)(16) and this permit;
2. The discharge(s) contains hazardous pollutants, toxics or any other substance which, because of its quantity, concentration or physical, chemical or infectious characteristics, may cause or contribute to an increase in mortality or morbidity in either an individual or the total population or pose a substantial present or future hazard to human health or the environment when discharged into waters of the Commonwealth;
3. The discharge(s), individually or in combination with other similar discharges, is or has the potential to be a contributor to pollution, which is more appropriately controlled under an individual permit;
4. Any of the discharge(s) would be to waters classified as "Special Protection" under 25 Pa. Code Chapter 93 of DEP's regulations;
5. The discharge(s) is not, or will not be, in compliance with the terms or conditions of this General Permit;
6. The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, schedule of compliance, or order issued by DEP;
7. The discharge(s) does not, or will not, result in compliance with applicable effluent limitations or water quality standards;
8. The discharge(s) is from an MS4 which DEP determines requires an individual NPDES permit to ensure compliance with the Clean Water Act, the Clean Streams Law or regulations promulgated thereunder;
9. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;
10. The discharge(s) is mixed with sources of non-stormwater, other than non-stormwater discharges that are:
  - a. Covered by and in compliance with a different NPDES permit; or
  - b. Identified by and in compliance with Part C.1 (authorized non-stormwater discharges) of this permit.
11. The discharge's direct, indirect, interrelated, interconnected or interdependent impacts would jeopardize a listed endangered or threatened species, or adversely modify designated critical habitat;
12. The discharge(s), or the implementation of a stormwater management program including the Minimum Control Measures, adversely affects properties listed or eligible for listing in the National Register of Historic Places, unless the MS4 operator is in compliance with requirements of the National Historic Preservation Act and has coordinated any necessary activities to avoid or minimize impacts with the appropriate State Historic Preservation Officer;
13. The discharge is from an MS4 where an NPDES permit has been terminated or denied.

## GENERAL CONDITIONS

The authority granted by this General Permit is subject to the following conditions:

1. Individual Permits. DEP may require any MS4 operator authorized by this General Permit to apply for and obtain an individual NPDES permit. Any interested person may petition DEP to take action under this paragraph. DEP will require the operator to apply for an individual NPDES permit only after the operator has been notified in writing that an individual permit application is required. The notice from DEP will include the following: (1) a brief statement of the reasons for this decision, (2) an application form, (3) a statement setting a

deadline for the operator to file the application and (4) a statement that on the effective date of the individual NPDES permit to be issued, coverage under this General Permit will automatically terminate. The applicant must submit the individual permit application within 90 days of receipt of notice. DEP may grant additional time to submit the application upon written request from the applicant. If an MS4 operator fails to submit, in a timely manner, an individual NPDES permit application required by DEP under this paragraph, then the applicability of this permit to the permittee is automatically terminated at the end of the day specified for submittal of the application.

2. Any MS4 operator authorized to discharge by this General Permit may request to be excluded from the coverage of this General Permit by applying for an individual permit. The operator must submit to DEP an individual permit application on approved Pennsylvania individual NPDES application forms, with reasons supporting the request.
3. When an individual NPDES permit is issued to an operator otherwise subject to this General Permit, the applicability of this General Permit to the individual NPDES permit is automatically terminated on the effective date of the individual permit. When an individual NPDES permit is denied to an operator otherwise subject to this General Permit, the operator may continue discharging if all eligibility requirements under this General Permit are met. If the operator does not meet the eligibility requirements of this General Permit or is otherwise prohibited from coverage under this General Permit, coverage under this General Permit is automatically terminated on the date of such denial, unless otherwise specified by DEP.
4. Amendments. DEP will publish a notice in the *Pennsylvania Bulletin* of any additional amendments to this General Permit, and after a comment period, a notice of the final availability of the amended General Permit will be published in the *Pennsylvania Bulletin*.
5. Modification, revocation, re-issuance. Permit approval under this permit may be modified or revoked and re-issued by DEP if monitoring data indicates one or more toxic pollutants are, or are expected to be, discharged by the permitted MS4. If there is evidence indicating potential or realized adverse impacts on water quality due to any stormwater discharge from an MS4 covered by this permit, the operator of such discharge may be required to obtain an individual NPDES permit.
6. Continuing responsibility. No condition of this permit releases the permittee from any responsibility or requirements under other federal or Pennsylvania environmental statutes or regulations or local ordinances.

**STORMWATER  
NPDES GENERAL PERMIT  
(PAG-13) ISSUED BY**

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**DIRECTOR  
BUREAU OF WATERSHED MANAGEMENT**

## PART A

# STORMWATER MANAGEMENT PROGRAM

### 1. EFFLUENT LIMITATIONS AND OTHER REQUIREMENTS

The permittee must, within the permit term, implement a stormwater management program approved by DEP which is designed to reduce the discharge of pollutants from its municipal separate storm sewer system (MS4) to the maximum extent practicable (MEP), with the goal of protecting water quality and satisfying the appropriate water quality requirements of the federal Clean Water Act and the Pennsylvania Clean Streams Law. The program must contain a schedule, best management practices and measurable goals for the six Minimum Control Measures described in Section A.2 below, and be approved by DEP.

DEP has developed a Stormwater Management Protocol ("*Protocol*"), which describes an approved stormwater management program, including best management practices (BMPs), a compliance schedule and measurable goals to comply with the Minimum Control Measures. The permittee may choose to implement one or more of the six Minimum Control Measures described below by using the relevant portions of the *Protocol*, or develop its own program of control measures as long as they comply with the Minimum Control Measure requirements included in this General Permit.

If the permittee elects to develop all or part of its stormwater management program independent of the *Protocol*, the NOI must include a proposed stormwater management program containing BMPs, measurable goals and a compliance schedule. In developing the BMPs, measurable goals and a compliance schedule, permittees should refer to the DEP *Protocol* and the EPA Stormwater Phase II Compliance Assistance Guide (EPA 833-R-O-002, March, 2000), available at: <http://www.epa.gov/npdes/pubs/comguide.pdf>.

Any stormwater management program approved by DEP becomes a part of the applicant's Authorization to Discharge under this permit.

### 2. MINIMUM CONTROL MEASURES

Permittees must, during the term of this General Permit, implement a Stormwater Management Program that meets the following Minimum Control Measures: 1) Public Education and Outreach on Stormwater Impacts, 2) Public Participation and Involvement, 3) Illicit Discharge Detection and Elimination, 4) Construction Site Runoff Control, 5) Post-Construction Stormwater Management in New Development and Redevelopment, and 6) Pollution Prevention and Good Housekeeping for Municipal Operations and Maintenance.

#### Public Education and Outreach

Develop and implement a public education program to distribute educational materials to the community, or conduct equivalent outreach activities, about the impacts of stormwater discharges on water bodies and the steps that the public can take to reduce pollutants in stormwater runoff.

#### Public Participation and Involvement

Implement procedures for receipt and consideration of information submitted by the public. Comply with state and local public notice requirements.

#### Illicit Discharge Detection and Elimination

Implement and enforce a program to detect and eliminate illicit discharges into the MS4:

- Develop a storm sewer system map, showing the location of all outfalls and the names and locations of all surface waters that receive discharges from those outfalls;
- Enact an ordinance prohibiting non-stormwater discharges into the MS4;
- Implement appropriate enforcement procedures and actions for the ordinance;
- Develop a plan to detect and address non-stormwater discharges, including illegal dumping, to the MS4;
- Inform public employees, businesses and the general public of the hazards associated with illegal discharges and improper disposal of waste, and

- Apply the preceding requirements to the types of discharges or flows identified in Section C.1.b of this General Permit only if they are identified as significant contributors of pollution to the MS4 and its discharges.

#### **Construction Site Runoff Control**

Implement and enforce a program to reduce pollution in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale that equals one acre or more:

- Enact an ordinance to require erosion and sediment controls, as well as sanctions to ensure compliance;
- Require construction site operators to implement appropriate erosion and sediment control best management practices (BMPs);
- Require construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter and sanitary waste at the construction site that may cause adverse impacts to water quality;
- Implement procedures for site plan reviews which incorporate consideration of potential water quality impacts;
- Implement procedures for receipt and consideration of information submitted by the public; and
- Implement procedures for site inspection and enforcement of control measures.

#### **Post-Construction Stormwater Management in New Development and Redevelopment**

Implement and enforce a program to reduce pollution in any stormwater runoff to the MS4 from new development and redevelopment projects that result in a land disturbance of greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale that equals one acre or more:

- Implement strategies which include a combination of structural and/or non-structural BMPs appropriate to the local community;
- Require infiltration BMPs where practicable;
- Use an ordinance to address post-construction runoff from new development and redevelopment projects; and
- Ensure adequate long-term operations and maintenance of BMPs.

#### **Pollution Prevention and Good Housekeeping for Municipal Operations and Maintenance**

Implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. Include employee training to prevent and reduce stormwater pollution from activities such as park and open space maintenance, new construction and land disturbances, and stormwater system maintenance.

### **3. USE OF THE DEP STORMWATER MANAGEMENT *PROTOCOL* TO MEET THE MINIMUM CONTROL MEASURE REQUIREMENTS**

Permittees may elect to implement the *Protocol* to meet the 6 Minimum Control Measure requirements. The *Protocol* becomes a part of the General Permit coverage and requirements for those permittees who elect to do so.

Permittees may also develop their own stormwater management program. That program, when approved by DEP, becomes a part of the General Permit coverage and requirements for those permittees who elect to do so.

## PART B

### STANDARD CONDITIONS

#### 1. MANAGEMENT REQUIREMENTS

##### a. Permit Modification, Termination, or Revocation and Reissuance

- (1) This General Permit may be modified, suspended, revoked and reissued, or terminated during its term for any of the causes specified in 25 Pa. Code Chapter 92. DEP may modify, revoke, suspend, or terminate previously issued coverage under this General Permit, and require the stormwater discharger to apply for and obtain an individual permit, in accordance with 25 Pa. Code Section 92.83.
- (2) The filing of a request by the permittee for a permit or coverage (1) modification, revocation and reissuance, or termination, or (2) a notification of planned changes or anticipated non-compliance, does not stay any permit condition.
- (3) Toxic Pollutants.
  - (a) Notwithstanding the above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Clean Water Act (33 U.S.C §1317(a) for a toxic pollutant that is present in the discharge, and such standard or prohibition is more stringent than any limitation for such pollutant in this General Permit, then this permit will be modified or revoked and reissued by DEP to conform with the toxic effluent standard or prohibition and the permittee so notified.
  - (b) In the absence of a DEP action to modify or to revoke and reissue this General Permit, any toxic effluent standard or prohibition established under Section 307(a) of the Clean Water Act (33 U.S.C. §1317(a) is considered to be effective and enforceable against the permittee.
- (4) Permit modification or revocation will be conducted according to 25 Pa. Code Chapter 92.

##### b. Duty to Provide Information

- (1) The permittee must furnish to DEP, within a reasonable time, any information that DEP may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this General Permit or coverage approved under this General Permit or to determine compliance with this General Permit.
- (2) The permittee must furnish to DEP, upon request, copies of records that are required to be kept under the conditions of this General Permit.
- (3) When the permittee becomes aware that he or she failed to submit any relevant facts or submitted incorrect information in the Notice of Intent or in any other report to DEP, the permittee must promptly submit or correct such facts or information.
- (4) The permittee must give advance notice to DEP of any planned physical alterations or additions to the MS4 which could, in any way, substantially affect the quality and/or quantity of stormwater discharged from the MS4.

#### 2. REPORTING AND RECORD KEEPING

##### a. Non-Compliance Reporting

- (1) **Required Reporting.** The permittee must report noncompliance to DEP as follows:
  - (a) 24-Hour Oral Reporting - the permittee must give at least a 24-hour advanced notice to DEP of any planned changes to the permitted activity or facility that may result in non-compliance with permit requirements. The permittee must also report non-compliance with any term or condition of this General Permit, and any statute, rule, or regulation, to DEP within 24 hours of becoming aware of the non-compliance.
  - (b) Follow-up Written Reporting - where the permittee orally reports the information in Part B.2.a.(1)(a), a written report outlining the same information must be completed, kept on file, and submitted to DEP upon request.

- (c) Non-compliance reporting pursuant to B.2.a.(1)(a) and (b) does not excuse a person from immediate notification to DEP of incidents causing or threatening pollution pursuant to 25 Pa. Code § 93.
- (2) **Required Information.** The reports and notifications required in Part B.2.a.(1) must contain the following information:
  - (a) A description of the discharge and cause of non-compliance;
  - (b) The period of non-compliance, including exact dates and times and/or the anticipated time when the discharge will return to compliance; and
  - (c) Steps being taken to reduce, eliminate, and prevent recurrence of the non-complying discharge.
- b. **Test Procedures** With the exception of the field screening conducted under the Illicit Discharge Detection and Elimination measure, wherever monitoring or sampling may be required, it must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this General Permit or have been approved by DEP in writing.
- c. **Retention of Records**
  - (1) The permittee must retain copies of the documentation related to the stormwater management program developed in accordance with Part B of this General Permit for a minimum of three years, and until at least one year after coverage under this General Permit terminates. The permittee must retain all records of all monitoring information, copies of all reports required by this General Permit, and records of all data used to complete the NOI until at least one year after coverage under this General Permit terminates. In addition, the permittee must retain on site, at all times, a complete copy of the NOI, this General Permit, and any authorizations received from DEP pursuant to this permit, until at least one year after coverage under this General Permit terminates. This period may be explicitly modified by alternative provisions of this General Permit or extended by request of DEP at any time.
- e. **Signatory Requirements**
  - (1) All NOIs must be signed and certified as follows:
    - (a) For a corporation: by a responsible corporate officer. For the purpose of this part, a responsible corporate officer means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function or any other person who performs similar policy or decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25,000,000 (in second-quarter 1980 dollars) if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;
    - (b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or
    - (c) For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official. For purposes of this part, a principal executive officer of a Federal agency includes (1) the chief executive officer of the agency, or (2) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of EPA).
  - (2) All NOIs must be notarized by a Notary Public.
  - (3) All reports required by the permit and other information requested by DEP must be signed by a person described above or by a duly authorized representative of that person.

A person is a duly authorized representative only if:

    - (a) The authorization is made in writing by a person described above and submitted to DEP with the reports.
    - (b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the organization. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).



- (4) Changes in Authorization. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the MS4, a new authorization satisfying the requirements of Part B.2.e.(1) must be submitted to DEP prior to or together with any reports, information, or applications to be signed by an authorized representative.

f. **Transfer of Ownership or Control**

- (1) This General Permit is not transferable to any person except after notice to DEP.
- (a) In the event of any pending change in control or ownership of the MS4 from which the authorized discharges emanate, the permittee must notify DEP by letter of such pending change at least 30 days prior to the change in ownership or control. The letter must be accompanied by the NOI and a written agreement between the existing permittee and the new owner or operator stating that the existing permittee will be liable for violations of the General Permit up to and until the date of coverage transfer and that the new owner or operator will be liable for permit violations under the General Permit from that date on.
- (b) After receipt of the required documentation, DEP will notify the existing permittee and the new owner or controller of its decision concerning approval of the transfer. Such requests will be deemed approved unless DEP notifies the applicant otherwise within 30 days.
- (2) DEP may require the new operator to apply for and obtain an individual NPDES permit, as stated previously in this General Permit.

- g. **Removed Substances** Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters or drinking water must be managed and disposed of in accordance with the requirements of the Solid Waste Management Act, 35 P.S. §6018.101, *et seq.*, and the Clean Stream Law, 35 P.S. §§691.1 *et seq.*, and in a manner such as to prevent any pollutant in such materials from adversely affecting the environment.

- h. **Facilities Construction, Operation and Maintenance** The permittee must properly design, build, operate and maintain all facilities and systems of treatment and control, including BMPs and any stormwater pollution prevention or management plans, which are installed or used by the permittee to achieve compliance with the conditions of this General Permit. BMPs must be designed, implemented, and maintained to minimize or eliminate the impacts of storm water runoff to the maximum extent practicable. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures and requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the General Permit.

- i. **Adverse Impact** The permittee must take all reasonable steps to minimize or prevent any discharge in violation of this General Permit that has a reasonable likelihood of adversely affecting human health or the environment.

j. **Termination of Coverage**

- (1) Notice of Termination. Where all stormwater discharges from a small MS4 that are authorized by this General Permit are eliminated, the operator of the MS4 may submit a letter that is signed in accordance with Part B.2.e. (signatory requirements) of this General Permit certifying that:

"Under penalty of law, I hereby certify that all MS4 discharges that are authorized by this NPDES General Permit have been eliminated. I understand that by submitting this notice of termination, that I am no longer authorized to discharge stormwater from the MS4 under this General Permit, and that discharging pollutants to surface waters of the Commonwealth is unlawful under the Clean Water Act and Clean Streams Law where the discharge is not authorized by an NPDES permit."

- (2) Addresses. All letters certifying discharge termination are to be sent to the appropriate regional office.

### 3. RESPONSIBILITIES

- a. **Duty to Comply** The permittee must comply with all terms and conditions of this General Permit. Any permit non-compliance constitutes a violation of the Pennsylvania Clean Streams Law and the federal Clean Water Act and is grounds for enforcement action, permit termination, revocation and reissuance, modification or denial of a permit or permit renewal. Financial distress, including failure to obtain Act 167 funding, does not relieve the permittee of the terms and conditions of this permit.

- b. **Penalties for Violations of Permit** The permittee may be subject to criminal and/or civil penalties for violations of the terms and conditions of this General Permit under Section 602 and 605 of the Clean Streams Law, 35 P.S. Sections 691.602 and 691.605, and under the Clean Water Act as specified in 40 CFR Sections 122.41(a)(2) and (3).
- c. **Need to Halt or Reduce Activity Not a Defense** The permittee may not use as a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity to maintain compliance with the conditions of this General Permit.
- d. **Penalties and Liability** Nothing in this General Permit may be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the CWA (33 U.S.C. §1321) or Section 106 of CERCLA.
- e. **Property Rights** The issuance of this General Permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.
- f. **Severability** The provisions of this General Permit are severable. If any provision of this permit or the application of any provision of this General Permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this General Permit will not be affected thereby.
- g. **Other Laws** Nothing in this General Permit may be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Clean Water Act.
- h. **Right of Entry** Pursuant to Sections 5(b) and 305 of the Pennsylvania Clean Streams Law (35 P.S. §§691.5(b) and 691.305) and 25 Pa. Code Chapter 92, and §1917-A of the Administrative Code, the permittee must allow the head of DEP, the EPA Regional Administrator, and/or an authorized representative of EPA or DEP, upon the presentation of credentials and other documents, as may be required by law, to:
  - (1) Enter upon the permittee's premises where a regulated activity is located or conducted or where records must be kept under the conditions of this General Permit;
  - (2) Have access to and copy at reasonable times, any records that must be kept under the terms and conditions of this General Permit;
  - (3) Inspect any facilities or equipment (including monitoring and control equipment); and
  - (4) Sample any discharge of stormwater.
- i. **Penalties for Falsification of Reports** Section 309(c)(4) of the Clean Water Act provides that any person who knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this General Permit, including reports of compliance or non-compliance will, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years or by both. In addition, criminal sanctions are set forth for false swearing and unsworn falsification at 18 Pa. C.S. §§4903-4904.
- j. **Penalties for Falsification of Monitoring Systems** The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this General Permit will, upon conviction, be punished by fines and imprisonment described in Section 309 of the Clean Water Act. In addition, criminal sanctions are set forth for false swearing and unsworn falsification at 18 Pa. C.S. §§4903-4904.

#### 4. DEFINITIONS

**Best Management Practices (BMPs)** - Schedules of activities, prohibitions of practices, structural controls (e.g., infiltration trenches), design criteria, maintenance procedures, and other management practices to prevent or reduce pollution to the waters of the Commonwealth. BMPs include Erosion and Sedimentation Control Plans, Post Construction Stormwater Management Plans, Stormwater Management Act Plans and other treatment requirements, operating procedures and practices to control runoff, spillage or leaks, sludge or waste disposal, drainage from raw material storage, and methods to reduce pollution, to recharge groundwater, to enhance stream base flow and to reduce the threat of flooding and stream bank erosion.

**Department** - The Department of Environmental Protection (DEP)

**Director** - The Secretary of the Department of Environmental Protection or any authorized employee thereof.

**Municipal Separate Storm Sewer System (MS4)** - a separate storm sewer (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains), which is all of the following:

- (1) owned or operated by a state, city, town, borough, township, county, district, association or other public body (created under state law) having jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes,
- (2) designated or used for collecting or conveying stormwater,
- (3) not a combined sewer, and
- (4) not part of a Publicly Owned Treatment Works.

**Municipality** - Any county, city, borough, town, township, school district, or any institution or any authority created by one or more of the foregoing.

**NOI** - The Notice of Intent for Coverage under the NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems.

**Outfall** - A "Point Source" at the point where an MS4 discharges to surface waters of the Commonwealth; this does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other surface waters and are used to convey surface waters.

**Point Source** - Point source as defined by 25 Pa. Code §92.1, which is any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft from which pollutants are or may be discharged.

**Small Municipal Separate Storm Sewer System** - A municipal separate storm sewer system (MS4)

- (1) designated by EPA at pages 68828-68831 of the Federal Register Volume 64, number 235 (December 8, 1999) based on the 1990 Decennial Census
- (2) designated by EPA based on the 2000 Decennial Census
- (3) designated by DEP based on the process described in 40 CFR §123.35

unless waived by DEP pursuant to the process described in 40 CFR §123.35

**Stormwater** - Runoff from precipitation, snow melt runoff and surface runoff and drainage.

**Surface Waters of the Commonwealth** - Any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface water, or parts thereof, including wetlands, whether natural or artificial, within or on the boundaries of this Commonwealth.

## PART C

### OTHER CONDITIONS

#### 1. Prohibition of Non-Stormwater Discharges

- a. Except as provided in Part C.1.b, all discharges authorized by this permit must be composed entirely of stormwater, or be in compliance with an NPDES permit (other than this permit) issued for the discharge.
- b. The following non-stormwater discharges may be authorized by this permit unless the MS4 or DEP has determined that the non-stormwater component of the discharge is a significant contributor of pollution to the MS4 and its discharges:
  - (1) discharges from fire fighting activities;
  - (2) potable water sources including dechlorinated waterline and fire hydrant flushings;
  - (3) irrigation drainage;
  - (4) lawn watering;
  - (5) water from individual residential car washing;
  - (6) dechlorinated swimming pool discharges;
  - (7) water from crawl space pumps;
  - (8) uncontaminated water from foundation or from footing drains;
  - (9) flows from riparian habitats and wetlands;
  - (10) routine external building washdown which does not use detergents or other compounds;
  - (11) pavement washwaters where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed) and where detergents are not used;
  - (12) air conditioning condensate;
  - (13) springs; and
  - (14) uncontaminated groundwater.

#### 2. Annual Report. The permittee must submit annual reports to DEP on June 9th of 2004-2008 to report on stormwater management program activities performed during the permit year ending March 9th of each year. The report shall be in the format provided by the Department.

- (a) Permittees must complete and submit the Annual Report Information Form, available on DEP website and on the CDROM.
- (b) The annual reporting requirements include information regarding:
  - (1) Types of BMPs installed;
  - (2) Geographic locations;
  - (3) Receiving water bodies;
  - (4) BMPs inspection and maintenance activities;
  - (5) Status of compliance with permit conditions and progress towards measurable goals;
  - (6) Assessment of the appropriateness of the BMPs;
  - (7) Steps to be taken to address any deficiencies in the BMPs or other aspects of the stormwater management program developed by the permittee;

- (8) Results of information collected and analyzed during the reporting period;
  - (9) Summary of stormwater activities planned during the next reporting cycle; and
  - (10) Any proposed changes to the stormwater management program, including changes to BMPs, measurable goals, or responsible parties.
- (c) Annual reports must be submitted to the appropriate regional office.

### 3. Certification

Any person signing documents under this section must make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."