

## **Response to Comments on Draft National Pollutant Discharge Elimination System (NPDES) Permit No. MA0040282 – Sterling Suffolk Racecourse, LLC**

### **Introduction:**

In accordance with the provisions of 40 C.F.R. §124.17, this response to comments (“RTC”) presents EPA Region 1’s (“EPA”) responses to public comments received on the Draft Permit developed for Sterling Suffolk Racecourse, LLC (“Suffolk” or “Permittee”), Draft NPDES Permit (MA0040282). This RTC also explains and supports the factual, legal and technical bases of the Final Permit’s terms and conditions. The Draft Permit’s public comment period began on March 1, 2013 and ended on March 30, 2013. The only comments received were submitted by the Permittee and by the Mystic River Watershed Association (“MyRWA”).

The Final Permit is similar to the Draft Permit that was available for public comment, particularly with respect to the permit’s effluent limitations derived from EPA’s National Effluent Limitations Guideline (“NELG”) applicable to Large Horse Concentrated Animal Feeding Operations (“CAFOs”) at 40 C.F.R. Part 412, Subpart A. EPA’s knowledge of the permitted facility has benefited, however, from the public’s comments and from some of the additional information submitted along with those comments. Based on those comments and related information, EPA has made certain clarifications and changes to the terms and conditions of the permit as reflected in the Final Permit. Those improvements are explained in detail in this RTC and are also individually listed after this introductory section.

The Permittee’s comments on the Draft Permit were voluminous and detailed, and included numerous assertions that the Draft Permit’s Fact Sheet contained erroneous statements of fact. As a general matter, EPA notes that Fact Sheets are final documents that accompany Draft Permits and they are not amended after they are issued with a Draft Permit. However, Suffolk’s comments are noted, and any inaccuracies in the Fact Sheet are clarified in this RTC document, which becomes part of the Administrative Record for the Final Permit.

While EPA has noted corrections for the record where necessary, the Permittee’s comments led to relatively few changes to the terms and conditions of the permit itself. For example, the Permittee’s comments did result in changes or adjustments to monitoring frequencies and/or locations. Additionally, the Final Permit takes into account the comments submitted by the Permittee that groundwater flows infiltrate the Permittee’s drainage system (“subsurface infiltration”) and discharge to the receiving waters through the facility’s outfalls during dry weather conditions (as well as during wet weather conditions). Based on that information, the Final Permit does not contain the Draft Permit’s prohibition against all dry weather discharges; e.g., discharges of subsurface infiltration are authorized by the Final Permit. The Final Permit also contains a discharge monitoring plan for these discharges.

Generally, the terms and conditions of the Final Permit derive from three separate parts of EPA’s National Pollutant Discharge Elimination (“NPDES”) regulations promulgated under the CWA: 1) EPA’s CAFO regulations; 2) EPA’s “industrial activity” storm water regulations; and 3) EPA’s standard NPDES permit conditions. Due to the complexity of the regulatory background,

and because many of EPA's responses draw from a common reservoir of fact and law, EPA has provided the foregoing explanation of the overall legal and technical bases of the federal regulatory approach embodied in the Final Permit in this introductory section of the RTC. This broader perspective informs and supplements EPA's individual responses to the public's comments. At the outset, before addressing the comments submitted to EPA, it is worth noting that the Permittee has already completed construction of significant physical changes to the permitted facility, and has begun to implement many of the operation and maintenance activities necessary to comply with EPA's regulations, as embodied in the Final Permit.

None of the public's comments asserted that any of these regulations are not legally applicable to the permitted facility. Moreover, none of the Permittee's comments on the Draft Permit entailed any significant change to the terms and conditions included in the Final Permit that implement the basic CAFO permitting requirements summarized above. In other words, none of the Permittee's comments on the Draft Permit were directed in any significant way at any of the *specific permit terms and conditions* implementing the CAFO requirements (with the minor exception of relatively subtle wording changes and/or clarifications to certain terms and conditions of the Draft Permit). Such changes and clarifications are discussed in detail throughout this Response to Comments Document.

The substance of the Permittee's various comments goes primarily to: 1) discharge outfall monitoring requirements; 2) terms and conditions that did not account for dry weather discharges of subsurface infiltration into the permitted facility's drainage system; 3) minor language changes and/or clarifications to certain of the permit's terms and conditions (some of which were originally taken from the Permittee's own NMP); and 4) the correct water quality classification of Sales Creek (Class SA or Class B) which, as explained later in the RTC, does not materially affect the permit. EPA responds in detail to each of those categories of comments in detail later in the RTC.

#### **SUMMARY OF CHANGES IN FINAL PERMIT:**

1. The statement "If no comments are received, this permit shall become effective following signature" has been removed, since comments were received on the draft permit.
2. Table 1 of the Fact Sheet has been amended and attached to the Final Permit as Table 1. Specifically for Outfalls 001 and 002 the references to Suffolk nomenclature PWP-1 and PWP-2 have been deleted and the text "sediment basin drainage channel" has been replaced with "(R)iprap slide that discharges to a vegetated swale to Sales Creek". The text at Outfall 011's location and description has been amended to read "Outfall pipe from sand filter to southwest side of Sales Creek where Sales Creek flows above ground in the Track Area in-field, near Washburn Street." The text has been amended to clarify that the subsurface infiltration is also discharged through several outfalls. See Responses 2.3 and 3.1.
3. The pH limit range for Class B waters (6.5 – 8.3 Standard Units (SU)) was inadvertently

included in Part I.A. of the Draft Permit. Part I.A. of the Final Permit includes the correct pH limit range for Class SA waters of 6.5 – 8.5 SU. Additionally, the language contained in Part I.A.6. of the Draft Permit (which has been renumbered as Part I.A.7. in the Final Permit) has been modified in the Final Permit to read as “For any permitted discharge, the pH of the effluent shall not be less than 6.5 Standard Units (SU), nor greater than 8.5 SU at any time, and not more than 0.2 units outside the natural background range.

4. Several of the terms found in Parts I.A. and B. of the Final Permit have been modified to be consistent with the terms proposed by Suffolk in Comment 2.2. See Response 2.2.
5. Page 1 and Part I.A.2. of the Final Permit clarifies that the permittee is authorized to discharge to an un-named stream and wetlands adjacent to Sales Creek. See Response 3.1.
6. The effluent limitations and monitoring requirements for outfalls 003, 006 and 006A are found in Part I.A.2.a.1. of the Final Permit.
7. The effluent limitations and monitoring requirements for outfall 004, 005 and 007 are found in Part I.A.2.a.2. of the Final Permit.
8. Language has been added to footnote 3 to Part I.A.2.a.2. describing that for each month, only one of the outfalls needs to be sampled, as long as each outfall is sampled at a minimum of four times per year (i.e., Outfalls 004, 005 and 007 may be sampled on a rotating basis), and that the permittee shall indicate on the DMR which outfall(s) was sampled. See Responses 2.5.
9. Language has been added to the footnotes to the tables in Part I.A.2. stating that written requests for a reduction in monitoring frequencies will be considered after the permit has been in effect for a period of three years. See Responses 2.5 and 3.9.
10. The clarifying language “other than as allowed at Part I.A.1.a.” has been added to Part I.A.13.b. (“Prohibitions”) of the Final Permit. See Response 3.2.
11. The requirement to monitor Outfalls 001 and 002 for oil and grease, found in Part I.A.1.b. of the Draft Permit, has been deleted. See Response 3.4.
12. The following language has been added to Footnote 1 of Part I.A.1.b.: “Samples taken in compliance with the monitoring requirements specified above shall be taken at a point representative of the discharge through the outfall, prior to mixing with the receiving water (top of overflow structure(s)). All samples shall be tested in accordance with the procedures in 40 C.F.R. Part 136, unless specified elsewhere in the permit. In the event that both of Outfalls 001 and 002 are discharging at the same time, the permittee may use the sampling results for either Outfall 001 or Outfall 002 to satisfy the sampling requirements for the other outfall. The permittee shall indicate on the DMR which outfall was sampled. Flow must be estimated for both outfalls (independently of the other) when they are both discharging” See Response 3.5.1.

13. Part I.A.2.b. of the Final Permit does not require wet-weather monitoring of Outfalls 008, 009, and 010. See Responses 2.5 and 3.5.3
14. Parts I.A.2.a.1 and I.A.3 of the Final Permit and Table 1 include an “Outfall 006A,” the 8-inch pipe that discharges Production Area roof runoff (stormwater), off-site roadway stormwater runoff and subsurface infiltration. The 24-inch pipe is now referred to as “Outfall 006” in the Final Permit and in Table 1. See Response 2.3.6.
15. The Final Permit requires the submittal of a proposed monitoring plan for the monitoring of flows originating from Suffolk’s property prior to co-mingling with flows that originate off site and/or are unregulated. Submittal of proposed monitoring plan within 6 months of the effective date of the permit. See Response 3.6.
16. Part I.A.1., Part I.A.2. and Part I.A.3. of the Final Permit includes monitoring requirements for enterococci bacteria. See Response 2.1.
17. The definition of dry weather has been modified in the Final Permit to read as follows: “Any period of time that meets both of the following two conditions: 1) there is no precipitation and no snow melt; and 2) the period of time is at least 72 hours after the end of a rainfall event that was greater than 0.1 inches in magnitude.” See Response 3.7.
18. Part I.A.5. – Language pertaining to oil and grease has been modified to reflect the water quality standards for Class SA waters. See Response 2.1.
19. Part I.A.11.g. – The prohibition of discharges during dry weather conditions does not apply to Outfalls 003-011. See Response 2.4.
20. A provision has been added to the Final Permit which prohibits the discharge of process wastewater not otherwise authorized by the permit (see Part I.A.13. of the Final Permit). See Response 2.2.
21. The term “Production Area” has been replaced with “Suffolk Downs” for requirements applicable to the entire facility.
22. The following clarifying language has been added to Part I.B.1.b.(1)(iv): “that precipitation does not come into contact with manure or bedding materials stored in storage dumpsters”.

**I. MYRWA COMMENTS:**

**Comment 1.**

MyRWA supports EPA's 2008 enforcement action, the resulting civil penalty and Supplemental Environmental Projects; and, the permittee's commitment to invest more than \$3M to prevent contaminated water from flowing into Sales Creek.

**Response 1.**

The comment is noted for the record.

**Comment 2.**

MyRWA recommends that the Final Permit require water quality sampling and reporting requirements for at least ten years.

**Response 2.**

The permit does not require water quality sampling, for the reasons discussed in Response 3, below. Further, this permit does not include conditions that extend beyond the 5-year term of the permit. 40 C.F.R. § 122.46(a) requires that NPDES permits be effective for a fixed term not to exceed five years. NPDES permits may be administratively continued beyond their expiration date if certain conditions are met. See 40 C.F.R. § 122.6. All terms and conditions of an administratively continued permit remain in effect until the renewal permit is issued. When Suffolk's NPDES permit is re-issued after its 5-year term expires, the renewed permit likely will continue to contain sampling and reporting requirements related to the protection of the water quality of the receiving waters.

**Comment 3. MyRWA requests the permittee be required to monitor the water quality of Belle Isle Inlet.**

**Response 3.**

Suffolk's process wastewater and storm water outfalls discharge to Sales Creek, adjacent wetlands, and an un-named tributary stream, not directly to Belle Isle Inlet. The Final Permit requires Suffolk to monitor and sample the discharges to Sales Creek and adjacent wetlands because those are the receiving waters. EPA has determined that the Final Permit's terms and conditions are sufficiently protective of the water quality of Sales Creek, the adjacent wetlands, the un-named tributary stream, and downstream waters, including Belle Isle Inlet. EPA has determined that the monitoring at the permitted facility's outfalls, rather than instream at the point of discharge or in downstream waterbodies, is reasonable because it provides sufficient information concerning the characteristics of the discharge and its potential impacts downstream, if any.

**Comment 4.**

MyRWA requests that the Final Permit include a requirement that all submittals and water quality data required by the Final Permit be made available on-line.

**Response 4.**

The Final Permit requires Suffolk to submit monitoring data and other reports to EPA and MassDEP. Regarding monitoring data, facility-specific discharge monitoring report data and other water quality data submitted by NPDES permit holders to EPA is entered into EPA's Integrated Compliance Information System (ICIS) database. The public may view such facility-specific data entered into ICIS on-line, at EPA's Enforcement and Compliance History Online (ECHO) website, <http://www.epa-echo.gov/echo>. At the current time, EPA does not have the resources to post all submittals, including written reports, on-line. However, in Region I's ongoing efforts to improve its web-sites, EPA will explore posting other submittals as required by the permit on the EPA web-site.

**II. STERLING SUFFOLK RACECOURSE ("SUFFOLK" OR "PERMITTEE")  
COMMENTS**

Suffolk submitted approximately 20 pages of comments. The comments are organized as follows: 1) Comments on Process; 2) Comments on the Fact Sheet; and 3) Comments on the Draft Permit. EPA has organized its responses following the organization of Suffolk's comments.

**1. COMMENTS ON PROCESS (COMMENTS 1.1. THROUGH 1.7)**

**Comment 1.1. Documents Reviewed**

Suffolk Downs's comments on draft NPDES Permit No. MA0040282 are based on its review of the only documents contained so far in the administrative record, which Suffolk Downs understands includes the following:

Suffolk Downs, NPDES Permit Application (Sept. 29, 2008)

MassDEP, Antidegradation Review and Determination, NPDES Permit Number MA0040282 (Sept. 24, 2012)

Draft NPDES Permit No. MA0040282 (Feb. 14, 2013)

Fact Sheet, Draft NPDES Permit No. MA0040282 (Feb. 26, 2013), with attachments

Letter, David M. Webster (EPA) to John Rizzo (Suffolk Downs) re: Draft Public Notice (Feb. 27, 2013)

Letter, David M. Webster (EPA) to David Ferris (Mass DEP) re: Draft NPDES Permit

No. MA0040282 (Feb. 27, 2013)

Joint Public Notice (Mar. 1, 2013)

Suffolk Downs has assigned numerical identifiers for each comment as to which Suffolk Downs believes Region and Mass DEP 1 should respond pursuant to 40 C.F.R. § 124.17 and 314 C.M.R. § 2.09. Each of the enumerated comments is significant to the purposes and objectives of the cited regulations. Some of the enumerated comments present more than one issue to which the Agencies should respond. *See Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 79 (1st Cir. 1993).

**Response 1.1**

EPA has responded to “significant comments” on a Draft Permit in accordance with regulations governing the NPDES permitting process. 40 C.F.R. § 124.17. EPA agrees that it was appropriate for Suffolk to review the documents referenced above in developing its comments on the Draft Permit.

**Comment 1.2. Terminology of Comments**

Specialized terms and citations used in these comments are listed below:

Term	Definition
Agencies	EPA Region 1 – New England and the Massachusetts Department of Environmental Protection
Appendix	Suffolk’s appendix of exhibits referenced in these comments, filed herewith
ARD	Antidegradation Review and Determination, NPDES Permit No. MA0040282 (Sept. 24, 2012)
BMP	Best Management Practices, as the Draft Permit defines the term
BOD <sub>5</sub>	Five-day biochemical oxygen demand
CAFO	Concentrated Animal Feeding Operation
Consent Decree	The consent decree in <i>U.S. v. Sterling Suffolk Racecourse, LLC</i> , Civil Action No. 12-11556 (lodged on Aug. 22, 2012, effective Sept. 27, 2012; found in Appendix, Exhibit 1)
CWA	The federal Clean Water Act, 33 U.S.C. § 1251 et seq.
Draft Permit	The draft of NPDES Permit No. MA0040282
EPA	U.S. Environmental Protection Agency
Fact Sheet	Fact Sheet for Draft Permit dated February 26, 2013
Joint Public Notice	The joint public notice of the Draft Permit, dated Mar. 1, 2013

MassDCR	Massachusetts Department of Conservation and Recreation
MassDEP	Massachusetts Department of Environmental Protection
Mass. WQS or WQS	Massachusetts Water Quality Standards, 314 CMR 4.00 et seq.
MCZM	Massachusetts Office of Coastal Zone Management
MSGP	Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (as modified, effective May 27, 2009)
MWRA	Massachusetts Water Resources Authority
NELG	National Effluent Limitation Guidelines for Large Horse CAFOs, 40 CFR § 412, subpart A.
Non-Production Area	The area shown as the “Non-Production Area” in Figure 1 to the Draft Permit
NSMP	Nutrient & Stormwater Management Plan prepared for Suffolk Downs, August 2012 (Fact Sheet, Attachment 1)
ORW	Outstanding Resource Water, as that term is defined in 314 CMR 4.06(1)(d)(2)
Production Area	The area shown as the “Production Area” in Figure 1 to the Draft Permit
Region 1 (or Region)	EPA New England – Region 1
Storage Pond	Suffolk’s holding pond for process wastewater, depicted on Figure 1 to the Draft Permit
Suffolk Downs (or Suffolk)	Sterling Suffolk Racecourse, LLC, the owner of the Suffolk Downs stables and racetrack
TSS	Total Suspended Solids

**Response 1.2.**

The terms, citations, and definitions referenced by Suffolk in Comment 1.2 are noted.

**Comment 1.3 EPA and MassDEP as Intended Recipients of Comments**

The Draft Permit states that it will be issued jointly by EPA under the federal CWA and by MassDEP under the Massachusetts Clean Waters Act, each pursuant to its respective permitting authorities. Under the Commonwealth's permitting procedures, 314 CMR 2.09, MassDEP is required to respond to comments on the Draft Permit. Accordingly, Suffolk Downs directs these comments to both EPA and MassDEP.

**Response 1.3.**

EPA is responsible for issuing NPDES permits under the Federal Clean Water Act within the Commonwealth of Massachusetts because Massachusetts has not received authorization from EPA to administer the NPDES permit program within its borders. Massachusetts maintains



separate water pollution control permitting authority under Massachusetts law. Generally, as here, when the Region issues an NPDES permit in Massachusetts under the Clean Water Act, MassDEP will concurrently issue a water permit pursuant to the Massachusetts Clean Waters Act. Thus, under this joint permitting scheme, the Draft Permit, Fact Sheet, Final Permit and RTC document are issued concurrently by EPA and MassDEP pursuant to the separate federal and state legal authorities. Consequently, the Fact Sheet and the responses in this RTC document reflect the conclusions of both EPA and MassDEP, unless otherwise noted.

#### **Comment 1.4 MassDEP Fact Sheet or Statement of Basis**

Under the Commonwealth's permitting procedures, 314 CMR 2.05, MassDEP is required to prepare and issue a Fact Sheet or statement of basis for every draft surface water discharge permit. Because the Fact Sheet states that both EPA and MassDEP are proposing the Draft Permit, Suffolk Downs understands that the Fact Sheet is on behalf of both EPA and MassDEP.

#### **Response 1.4**

See response to Comment 1.3 above.

#### **Comment 1.5 Comments to MCZM**

The Massachusetts Office of Coastal Zone Management must certify that the Final Permit is consistent with MCZM's enforceable policies under the Coastal Zone Management Act.

Although MCZM has not requested comments on whether the Draft Permit is consistent with MCZM's enforceable policies, Suffolk Downs directs to MCZM all of the enclosed comments for MCZM's consideration in making its determination under the Act.

MCZM's enforceable policies at 301 CMR 21 include Water Quality Policy #1, which includes ensuring "that point-source discharges in or affecting the coastal zone are consistent with federally-approved state effluent limitations and water quality standards." 301 CMR 21.98(3). For the reasons stated in these comments, issuing Suffolk Downs a NPDES permit as modified in accordance with Suffolk Downs's comments will be consistent with state effluent limitations and water quality standards.

#### **Response 1.5**

The comment is noted for the record. MCZM typically issues its certification ("consistency letter") after MassDEP issues its Clean Water Act section 401 water quality certification. They have followed that procedure in this instance. The certifications are included in the Administrative Record for this permit action.

#### **Comment 1.6 Reservation of Rights**

Suffolk Downs reserves the right to supplement these comments with any additional information that it has not had adequate opportunity to develop during the comment period, and with any new

information or data that may arise concerning the proposed receiving water, Sales Creek. (For example, as of the date of these comments, MassDEP has not timely produced in accordance with the Commonwealth's public-records laws certain records pertaining to the status and classification of Sales Creek, and the issuance of prior surface-water discharge permits pertaining to the Creek. See Affidavit of Amanda LaPorta (Appendix, Exhibit 2). Additionally, Suffolk Downs reserves the right to respond to any comments or materials that the Agencies receive during the public comment period or as the Agencies may allow thereafter. The Agencies should give full attention to such later comments and information as if Suffolk Downs had submitted them along with these comments. Suffolk Downs further reserves the right to request a public hearing in light of any later-developed information or data.

### **Response 1.6**

Suffolk may exercise any and all rights allowed pursuant to the CWA and its implementing regulations. However, Suffolk is not entitled to reserve rights not granted or otherwise allowed under the CWA and its implementing regulations. Suffolk's Comment 1.6 contains three separate assertions. First, Suffolk comments that it "reserves the right to supplement these comments with any additional information that it has not had adequate opportunity to develop during the comment period, and with any new information or data that may arise concerning the proposed receiving water, Sales Creek." The NPDES regulations do not extend a right to Suffolk to supplement the comments it makes during the public comment period with additional comments submitted after the close of the public comment period for "additional information that it has not had adequate opportunity to develop during the comment period" or for "any new information or data that may arise" after the public comment period closes. The vast majority of EPA-issued permits have public comment periods of only 30 days, which EPA has found to be sufficient even where complex technical matters are at issue. This timeframe is consistent with and satisfies EPA's procedural regulations regarding public comment periods for NPDES draft permits. See 40 C.F.R. § 124.10(b). EPA also observes that the comment period apparently was sufficient for the Permittee to assemble its comments given the number of comments made and their highly detailed nature. Under applicable federal regulations, EPA is only required to respond to materials submitted *during* the public comment period. See 40 C.F.R. § 124.17(a)(2). "That is, within the interval of time between the beginning and end of the public comment period, not before, not after." *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 706 (EAB 2002); see also, *In re City of Phoenix, Arizona Squaw Peak and Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 524-31 (EAB 2000); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 n.32 (EAB 2000) ("Permitting authorities are under no obligation to consider comments received after the close of the public comment period.").

Second, Suffolk asserts that it has "reserved the right to respond to any comments or materials that the Agencies receive during the public comment period or as the Agencies may allow thereafter."

Insofar as Suffolk's comment addresses "comments or materials" that the "Agencies may allow" after the close of the public comment period, the comment is moot because the Agencies have not provided additional time for any such comments or materials, nor have the Agencies received any.

Finally, Suffolk states that it “reserves the right to request a public hearing in light of any later-developed information or data.” However, EPA’s regulations do not provide a right to any person to request a public hearing after the close of the public comment period. *See* 40 C.F.R. § 124.11. EPA notes that Suffolk did not request a hearing during the public comment period.

### **Comment 1.7 Additional Technical Information**

Suffolk Downs requests that if the Agencies, upon reviewing these and any other comments, find that they need more information to complete their review, the Agencies identify the missing information and provide an opportunity for additional comment. Suffolk Downs will supply promptly whatever information it reasonably can.

### **Response 1.7**

EPA appreciates Suffolk’s offer in Comment 1.7 and its willingness to promptly supply additional information, if requested. EPA notes that it had, in fact, sought additional information in the past from Suffolk and that Suffolk promptly provided such information. Specifically, on May 14, 2013, EPA requested that Suffolk submit to EPA the results of any additional oil and grease sampling conducted at MWRA sampling location 0101 since the sampling event of February 22, 2013. Suffolk submitted the requested information on May 14, 2013. In direct response to Suffolk’s comment, however, the Agencies have concluded that for purposes of their review and issuance of the Final Permit, the Agencies do not need any additional information, either as a result of Suffolk’s comments or as a result of any other party’s comments on the Draft Permit.

## **2. COMMENTS ON THE FACT SHEET**

EPA has noted in its responses to Suffolk’s specific comments any instances where EPA now agrees with or concedes a specific point Suffolk makes as to any factual misstatement contained in the Fact Sheet. EPA’s responses also include a statement as to whether and to what extent correction of those factual misstatements affect the actual terms and conditions of the Final Permit. In those instances where correction of a factual misstatement did lead to a change to a term or condition of the Final Permit, EPA notes that in its response.

### **Comment 2.1 The Fact Sheet Incorrectly Characterizes Sales Creek and Applicable Water Quality Standards**

Page 1 of the Fact Sheet identifies the “Receiving Water” as “Sales Creek; State Basin Code MA-70-10,” which the Fact Sheet further lists as having a “Class SA/ORW” classification under the Mass. WQS. Under 314 CMR 4.05(4)(a), a “Class SA” water is a “Coastal and Marine”- class water. 314 CMR 4.02 defines “Coastal and Marine Waters” as “The Atlantic Ocean and all contiguous saline bays, inlets and harbors within the jurisdiction of the Commonwealth including areas where fresh and salt waters mix and tidal effects are evident or any partially enclosed coastal body of water where the tide meets the current of a stream or river.”

Both the asserted Basin Code for and the classification of Sales Creek are incorrect.

The Fact Sheet's misidentification of the Receiving Water may be the result of both an incorrect understanding of Sales Creek's geography and hydrology as it passes through the Suffolk Downs property and a misinterpretation of a MassDEP list.

### **Response 2.1.**

There are two parts to Suffolk's Comment 2.1. One relates to the proper "basin code." The other relates to the water quality standard classification of Sales Creek.

#### Basin Code

Suffolk's comment about the basin code for Sales Creek is correct. EPA agrees with Suffolk that the Cover Page to the Fact Sheet incorrectly lists the basin code for Sales Creek as State Basin Code MA-70-10, and that the Fact Sheet should have indicated that the State Basin Code is MA-71-12. That was a simple, inadvertent error in the Fact Sheet.

#### Classification of Sales Creek

The Massachusetts Surface Water Quality Standards ("MSWQS"), at 314 CMR 4.06, classifies "Belle Isle Inlet and tributaries thereto" as SA, with qualifiers of shellfishing and ORW. Sales Creek is a tributary to Belle Isle Inlet and is therefore included in that SA/ORW and shellfishing classification. "Belle Island Inlet and tributaries thereto", including Sales Creek, were designated as an ORW in the 1990 revisions to the MSWQS because they are part of the Rumney Marsh ACEC.

The Mystic River Watershed and Coastal Drainage Area 2004-2008 Water Quality Assessment Report identified Sales Creek as Segment MA71-12 and erroneously classified the segment as a Class B water. MassDEP subsequently issued an errata sheet for the Report indicating that the correct Sales Creek classification is SA/ORW.

It appears that a tide gate and a stormwater pump station separate Sales Creek from Belle Isle Inlet. The errata sheet to the Report noted that a tide gate system separates Sales Creek from Belle Isle and also noted that Sales Creek is not tidal. The errata sheet also contained a statement recommending that the next revision to the MSWQS include a reclassification of Sales Creek as a Class B/ORW.

Before the next revision of the MSWQS, MassDEP will most likely determine how the tide gate and the stormwater pump station operate, whether Sales Creek is hydraulically separate from Belle Isle Inlet, and whether Sales Creek is a fresh water body. Unless and until the MSWQS has been amended and approved by EPA, Sales Creek remains classified as an SA/ORW in accordance with the existing MSWQS.

Suffolk's comments note that the phrases "Inland Waters or Fresh Waters" and "Coastal and Marine Waters" as defined in 314 CMR 4.00 *et. seq.* of the Commonwealth's surface water quality standards show that Sales Creek was originally intended by MassDEP to be a Class B

water in light of the presence of a tidal gate (the existence of which is not in dispute) that is designed to prevent salt water from flowing into Sales Creek from Belle Isle Inlet due to tidal influences and interactions. Suffolk's point appears to be that if Sales Creek is, in fact, a freshwater water body that does not interact with the tidal influences of Belle Isle Inlet (due to the tidal gate), then the creek could not have been intended to be a Class SA water when the Commonwealth's water quality standards (including Table 15) were adopted as state law and approved by EPA under the CWA.

Suffolk argues that Sales Creek is a Class B water based on: (1) the definitions of a Class SA and Class B water set forth in the MSWQS at 314 CMR 4.0, (2) the facts presented in this response which would lead one to question the hydraulic connection between Sales Creek and Belle Isle Inlet and (3) the various MassDEP and EPA administrative actions noted by Suffolk in its comments (in which Sales Creek was treated as a Class B water). EPA's view, is that, while the line of argument asserted by Suffolk leading to the interpretation that Sales Creek is a Class B water is not necessarily unreasonable, neither is MassDEP's interpretation. Mass DEP's interpretation is based on the use of the word "tributary" in the Commonwealth's water quality standards and on the fact that Sales Creek is a tributary to Belle Isle Inlet. EPA believes that MassDEP's reasonable interpretation of its own regulatory language should receive deference. Accordingly, EPA has addressed this complex legal and factual backdrop in the following manner in the context of the Final Permit.

In addressing this comment, it is useful to note that the actual permit terms and conditions would differ only very slightly if Sales Creek were classified as a Class B water instead of being classified as a Class SA water. First, only one numeric limit would differ, and even that difference would be minimal. The range for allowable pH values for Class B waters is 6.5-8.3 Standard Units (SU) (and not more than 0.5 units outside of the natural background range), whereas the allowable range for Class SA waters is 6.5-8.5 SU (and not more than 0.2 standard units outside of the natural background range).

A second difference in permit conditions relates to the type or kind of bacteria parameter that would be monitored for under the permit. For saltwater, enterococci are the better indicator to monitor for, but they are not as useful as *E. coli* for freshwater bodies. *E. coli* are often sufficient as a bacterial indicator parameter for freshwater bodies. However, EPA would be justified in requiring monitoring for enterococci even if Sales Creek were classified as a Class B water, due to the fact that Sales Creek flows into Belle Island inlet (i.e., Belle Isle inlet is "downstream of the discharge") and therefore warrants protection for Belle Isle inlet. Moreover, the practical and cost differences associated with the difference in monitored parameters are not significant, and so there is virtually no difference in terms of the cost to the permittee.

Finally, the third and only remaining difference would be to the precise wording of the provision in the permit relating to sheens on the surface of the water body. Class SA waters "*shall be free from oil and grease, petrochemicals and other volatile or synthetic organic pollutants*" (314 CMR 4.05(4)(a)(7)). Class B waters "*shall be free from oil, grease and petrochemicals that produce a visible film on the surface of the water, impart an oily taste to the water or an oily or other undesirable taste to the edible portions of aquatic life, coat the banks or bottom of the water course, or are deleterious or become toxic to aquatic life*" (314 CMR4.05(3)(b)(7)).

In light of all of the issues and information discussed above, EPA has adopted the following approach in the Final Permit. For purposes of the Final permit, Sales Creek will be considered to be a Class SA water (in deference to MassDEP's reasonable interpretation of the language of its own standards), and the very limited number of affected permit terms and conditions will reflect that position.

Moreover, because discharges from Suffolk Downs may impact both freshwater and saltwater conditions, EPA is requiring monitoring for parameters specific to each in Parts I.A.1.-4. of the Final Permit. These include monitoring requirements for enterococci (which is the preferred bacterial indicator of health risk from contact with salt water), *E. coli* (which is the preferred bacterial indicator of health risk for contact with fresh water), and fecal coliform bacteria (which are a bacterial indicator of health risk for contact with both fresh and salt water).

In addition, language pertaining to oil and grease found in Part I.A.4. of the Draft Permit has been modified in the Final Permit to be consistent with the water quality standards for Class SA waters.

**Comment 2.1.1. The Fact Sheet Incorrectly Describes Sales Creek As It Passes Through the Suffolk Downs Property**

The Fact Sheet begins by noting that Sales Creek bisects the Suffolk Downs property, entering the property through a culvert, entering another culvert before surfacing in the infield of the racetrack, and entering another culvert before draining east of Bennington Avenue.<sup>1</sup> The Fact Sheet asserts that Sales Creek drains into Belle Isle Inlet, which the Fact Sheet mentions is designated as an ORW. The Fact Sheet asserts that Sales Creek is "tidally connected to Belle Isle Inlet," although the Fact Sheet also mentions that a tidal gate, the "Bennington Street tandem tidal gate," "shuts out incoming tidal surges but allows Sales Creek runoff to flow into Belle Isle Inlet unimpeded." At page 18 of the Fact Sheet, however, the Fact Sheet quotes MassDEP materials that acknowledge that the tide gate prevents Sales Creek upstream of the tide gate from functioning as a tidal system.

The latter characterization is correct. The tide gate blocks all tidal flows, not just "tidal surges." When the tide does not reach the tide gate, Sales Creek flows into Belle Isle Inlet unimpeded. When the tide reaches the gate and exceeds the upstream water level, the gate shuts. At that point, all of Sales Creek's flows remain behind the gate unless pumped to Belle Isle Inlet via the MassDCR Bennington Street pump station. See Affidavit of Sean Reardon (Appendix, Exhibit 4).

Sales Creek thus is not "tidally connected" to Belle Isle Inlet upstream of the Bennington Street tidal gate. Upstream of the gate, no part of the Atlantic Ocean, and no part of any contiguous

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<sup>1</sup> [Footnote 1 to Suffolk Downs' Comment 2.1.1] Page 4 of the Fact Sheet states that the existing Sales Creek culverts within the boundaries of Suffolk Downs were completed in 1982. That statement is incorrect: both culverts, which are owned by MassDCR, were rebuilt in 2005. See Excerpts, Massachusetts Department of Conservation & Recreation, Notice of Intent, Restoration of Sales Creek Discharge System (June 2005) (Appendix, Exhibit 3).

“saline bay, inlet or harbor,” enters Sales Creek. Upstream of the Bennington Street gate, there is no area (in the words of the Mass. WQS) “where fresh and salt waters mix and tidal effects are evident or any partially enclosed coastal body of water where the tide meets the current of a stream or river.” The tide does not meet the waters of Sales Creek until those waters are downstream of the Bennington Street gate.

### **Response 2.1.1.**

Suffolk’s comment contains a number of separate and distinct points.

- a. Suffolk asserts that “*the Fact Sheet begins by noting that Sales Creek bisects the Suffolk Downs property, entering the property through a culvert, entering another culvert before surfacing in the infield of the racetrack, and entering another culvert before draining east of Bennington Avenue*”. Suffolk’s associated footnote states that “*Page 4 of the Fact Sheet states that the existing Sales Creek culverts within the boundaries of Suffolk Downs were completed in 1982. That statement is incorrect: both culverts, which are owned by MassDCR, were rebuilt in 2005*”.

**EPA response:** EPA accepts Suffolk’s contention that the culverts in question were rebuilt in 2005, but also notes that this has no bearing on the permit’s terms and conditions. Nor were the statements on Page 4 of the Fact Sheet to which Suffolk refers used in fashioning any of the permit’s terms and conditions.

- b. Suffolk’s comment mentions that “*the Fact Sheet asserts that Sales Creek drains into Belle Isle Inlet, which the Fact Sheet mentions is designated as an ORW*”.

**EPA response:** Suffolk does not state in this comment that the sentence in question is erroneous. Nor does Suffolk seek a change to the permit’s terms and conditions in relation to this sentence. Thus, no further response to the sentence is necessary.

- c. Suffolk notes that there are statements in the Fact Sheet regarding the relationship between Sales Creek, Belle Isle Inlet, and a tidal gate that is designed to prevent tidal interactions between the two water bodies that are not consistent with one another.

**EPA response:** EPA agrees with Suffolk that a tidal gate exists in the stated location, but EPA has no evidence that the tidal gate is functioning properly or improperly in relation to its intended purpose. Further, while the existence of the tidal gate may be an important fact that MassDEP chooses to consider in deciding whether to reclassify Sales Creek from Class SA to Class B in the future through a change to its water quality standards, as noted in EPA’s response to Suffolk’s Comment 2.1., the facts asserted by Suffolk in this comment (assumed to be true only for the purpose of this response), do not entail a change to the permit terms and conditions because such facts do not alter MassDEP’s legal conclusion that Sales Creek is currently classified as an SA water under the Commonwealth’s surface water quality standards.

**Comment 2.1.2.**

**The Fact Sheet Incorrectly Interprets Table 15 of 314 CMR 4.06 (Tables and Figures)**

The Fact Sheet appears to base its designation of Sales Creek upon Table 15 to 314 CMR 4.06. Table 15 designates various waterbodies within the “Boston Harbor Drainage Area” for purposes of the Mass. WQS. The notes for Table 15 state that “Belle Isle Inlet and all tributaries thereto” are Class SA and ORW. Table 15 does not explain what it means by a “tributary” to Belle Isle Inlet. The Mass. WQS does not explain what “tributary” means in this context either.<sup>2</sup> The evidence suggests that the drafters of Table 15 did not mean to include within the scope of “tributaries to Belle Isle Inlet” those portions of Sales Creek that are upstream of the Bennington Street gate. That evidence is as follows:

- The Belle Isle Inlet tributaries to which Table 15 refers are “Class SA” waters. As shown in Comment 2.1.1, upstream of the Bennington Street gate, Sales Creek has no coastal or marine characteristics. Under 314 CMR 4.02, “[a]ny surface water not subject to tidal action or not subject to the mixing of fresh and ocean waters” is an “Inland Water or Fresh Waters.” In its Tables and Figures accompanying 314 CMR 4.06, where MassDEP designates a waterway that has both “coastal” and “inland” portions, it does so expressly. See, for example, Table 15’s descriptions for Weymouth Back River and Weir River, Table 20’s description for Plumbush Creek, and Table 21’s designations for Eagle Hill River, Third Creek, Roger Island River, Rowley River, Egypt River, Mud Creek, Pine Island Creek, Little Pine Island Creek, and Jericho Creek.

- The Fact Sheet asserts that Sales Creek has State Basin Code MA-70-10. According to MassDEP’s Massachusetts 2012 List of Integrated List of Waters (Jan. 2012) (“MassDEP 2012 List,” Appendix, Exhibit 5), Basin MA-70-10 is for an area of Boston Harbor “From the tidal flats at Coleridge Street, Boston (East Boston) to a line between Logan International Airport and Point Shirley, Boston/Winthrop.” Id. at 108.<sup>3</sup> The MassDEP 2012 List denotes “Sales Creek” as Basin MA-71-12, and describes Sales Creek as follows: “Headwaters near Route 145, Revere to tidegate/confluence with Belle Isle Inlet, Boston/Revere.” Id. at 67.<sup>4</sup> The drainage area attributed to the “upstream” portion of Sales Creek is 0.008 square miles, the identical area reported in the Fact Sheet. See id.

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<sup>2</sup> [Footnote 2 to Suffolk Downs’ Comment 2.1.2] 314 CMR 4.06(7) contains a definition of “Tributaries” that pertains only to Class A public water supplies.

<sup>3</sup> [Footnote 3 to Suffolk Downs’ Comment 2.1.2] The same report lists Winthrop Bay as a “Category 5” water that needs a Total Maximum Daily Load Limit for bacteria and PCBs. See id. The Draft Permit does not impose any related requirements.

<sup>4</sup> [Footnote 4 to Suffolk Downs’ Comment 2.1.2] The report lists Sales Creek as being a “Category 3” water, whose uses have not been assessed.



•In April 1998, the Agencies issued to Global REVCO Terminal, LLC, located in Revere, a NPDES permit (NPDES Permit No. MA0003298<sup>5</sup>) allowing stormwater discharges into Sales Creek. The Agencies renewed that permit in 2005.<sup>6</sup>

Suffolk Downs has reviewed EPA's files pertaining to the Global REVCO permit, and has found no suggestion that either Agency ever considered in connection with Global REVCO Sales Creek to be a "tributary" of Belle Isle Inlet for purposes of the latter's Class SA/ORW designation. See Appendix, Exhibit 2; see also Fact Sheet, NPDES Permit No. MA0003298, 4 (2005) (recognizing that Sales Creek eventually flows into Belle Isle Marsh "and from there into Winthrop Harbor...a Class SB water body"); *id.* At 10 (noting same designation); *id.* at 11 (noting that proposed renewal of permit "is not being considered in isolation," but rather in the context of "all potential direct dischargers" into Boston Harbor).

•For several years, MassDEP has recognized that the tide gate separates two waterways. Page 18 of the Fact Sheet cites MassDEP's Mystic River Watershed and Coastal Drainage Area 2004-2008 Water Quality Assessment Report (Mar. 2010) ("Mystic River Report"), which designates "Sales Creek" as Basin MA71-12, and describes it in the same manner as the MassDEP 2012 List. See Mystic River Report at 36. The Report calls Sales Creek a "Class B" water, and not an ORW. The Report calls the waterway downstream of the tide gate "Belle Isle Inlet," and gives it a different basin number, MA71-14. That basin is classified as a Class SA/ORW. See *id.* at 37.

•As page 18 of the Fact Sheet admits, following publication of the Mystic River Report, MassDEP issued an "Errata Sheet," available at [www.mass.gov/dep/water/resources/71er0610.htm](http://www.mass.gov/dep/water/resources/71er0610.htm). The Errata Sheet claims that the Report's classification of MA71-12 is incorrect. The Errata Sheet asserts that the Mass. WQS already had classified MA71-12 as "Class SA/ORW" because it was a "tributary" to Belle Isle Inlet. The Errata Sheet does not state who concluded that Sales Creek was a Class SA/ORW tributary to Sales Creek. The Errata Sheet goes on to admit that basin MA71-12 is "separated from Belle Isle Inlet by a tidal gate and does not function as a tidal system. It is recommended that this waterbody be reclassified in the next revision of the [Mass. WQS] as a Class B/ORW."<sup>7</sup> (Emphasis added.)

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<sup>5</sup> [Footnote 5 to Suffolk Downs' Comment 2.1.2] All referenced Massachusetts NPDES permits and supporting materials are available through Region 1's website, [www.epa.gov/region1/npdes/mass.html](http://www.epa.gov/region1/npdes/mass.html).

<sup>6</sup> [Footnote 6 to Suffolk Downs' Comment 2.1.2] Global REVCO's permit expired in June 2010. Region 1's website does not indicate whether Global REVCO applied for renewal of its permit.

<sup>7</sup>[Footnote 7 to Suffolk Downs' Comment 2.1.2] While the Errata Sheet's proposed designation of its basin MA71-12 as a Class B waterway appears to be correct, see 314 CMR 4.05(3)(b), the Errata Sheet gives no explanation for why MA71-12 would qualify as an ORW under the Mass. WQS. The ORW designation requires nomination as such. See 314 CMR 4.06(1)(d)(2). Table 15 does not answer this question, as it defines the Belle Isle Inlet ORW in terms of its "Class SA" waters. As explained above, Sales Creek upstream of the tidal gate cannot be a Class SA water, as it is not tidally influenced. When MassDEP designates an entire waterway as an ORW, regardless of its class, it lists the waterway without an associated class designation. See, for example, 314 CMR 4.06, Table 17 (designation of three "tributaries" to the Nissitissit River). Moreover, MassDEP designates ORWs "based on their outstanding socio-economic, recreational, ecological and/or aesthetic values." 314 CMR 4.04(3). As of January 2012, MassDEP had not assessed the uses or values of Sales Creek, see MassDEP 2012 List at 67, and so the Errata Sheet's suggestion that Sales Creek has qualified (or could qualify) for ORW designation is dubious.

- In May 2008, EPA Region 1 (with the assistance of MassDEP) issued an administrative order to Suffolk Downs concerning its discharges to Sales Creek. The administrative order states that the Mass. WQS classified Sales Creek as a “Class B” waterway. See Findings of Violation and Order for Compliance, In the Matter of Sterling Suffolk Racecourse, LLC, EPA Region 1 Docket No. 08-015, 34 (May 2, 2008) (Appendix, Exhibit 6).

- In May 2011, Suffolk Downs filed an environmental notification form (“2011 ENF”) with the Commonwealth’s Secretary of Energy and Environmental Affairs for authorization of the process-wastewater control project built in 2011-12. See Suffolk Downs Environmental Notification Form, EEA No. 14747 (May 16, 2011) (Appendix, Exhibit 7). The 2011 ENF asked Suffolk Downs to identify ORWs on or within a half-mile radius of the project site. The 2011 ENF stated: “Sales Creek (a surface water body designated as Class B pursuant to the [Mass. WQS] drains through a tide gate into the coastal waters of Belle Isle Inlet, which is an ORW. The ORW status of Sales Creek upstream of the tide gate is uncertain.” Id. at 5-6. The 2011 ENF was circulated to several Commonwealth agencies, including MassDEP. No one (including MassDEP) disputed the description of Sales Creek and its status. See Certificate of the Secretary of Energy and Environmental Affairs on the Environmental Notification Form, EEA No. 14747 (June 22, 2011) (Appendix, Exhibit 8).

- In September 2012, MassDEP issued the ARD for the Draft Permit. Page 2 of the ARD states (emphases added):

[Suffolk Downs] is bisected by Sales Creek, a small (0.008 square mile) fresh water body classified as Class B/ORW<sup>8</sup> in the Massachusetts Surface Water Quality Standards (314 CMR 4.00) Sales Creek enters the facility through a culvert and surfaces in the infield of the racetrack before being culverted again and draining (from the west side of Bennington Avenue) to Belle Island [sic] Inlet, an outstanding resource marine water (ORMW).

Page 5 of the ARD treats Sales Creek as separate from Belle Isle Inlet (emphasis added):

The MassDEP evaluated and developed a comprehensive list of the [Commonwealth’s] assessed waters and the most recent list was published in the Massachusetts Year 2008 Integrated List of Waters. The Commonwealth has not assessed Sales Creek’s uses nor has a TMDL been developed for it. The Massachusetts Year 2008 Integrated List of Waters... identifies Winthrop Bay and Belle Isle Inlet (the closest water bodies to Sales Creek evaluated by MassDEP) as impaired.

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Suffolk Downs has asked MassDEP to produce all records pertaining to any nomination of Sales Creek as an ORW, but has received no such records. See Appendix, Exhibit 2

<sup>8</sup>[Footnote 8 to Suffolk Downs’ Comment 2.1.2] See the discussion of the ORW topic in note 7 above.

**Response 2.1.2.**

In Comment 2.1.2, Suffolk asserts the following point regarding the classification of Sales Creek, and then describes various sources of information which Suffolk asserts in support of its contention. Comment 2.1.2 begins as follows:

*The Fact Sheet appears to base its designation of Sales Creek upon Table 15 to 314 CMR 4.06. Table 15 designates various waterbodies within the "Boston Harbor Drainage Area" for purposes of the Mass. WQS. The notes for Table 15 state that "Belle Isle Inlet and all tributaries thereto" are Class SA and ORW. Table 15 does not explain what it means by a "tributary" to Belle Isle Inlet. The Mass. WQS does not explain what "tributary" means in this context either. The evidence suggests that the drafters of Table 15 did not mean to include within the scope of "tributaries to Belle Isle Inlet" those portions of Sales Creek that are upstream of the Bennington Street gate.*

EPA's response to Suffolk's principal assertion as set forth in the excerpt immediately above is included in EPA's response to Comment 2.1., above. As to the various sources of information Suffolk asserts support its position, EPA responds to each individual point, as follows:

- a. **Suffolk's comment:** *Suffolk asserts that the Belle Isle Inlet tributaries to which Table 15 refers are "Class SA" waters. As shown in Comment 2.1.1, upstream of the Bennington Street gate, Sales Creek has no coastal or marine characteristics. Under 314 CMR 4.02, "[a]ny surface water not subject to tidal action or not subject to the mixing of fresh and ocean waters" is an "Inland Water or Fresh Waters." In its Tables and Figures accompanying 314 CMR 4.06, where MassDEP designates a waterway that has both "coastal" and "inland" portions, it does so expressly. See, for example, Table 15's descriptions for Weymouth Back River and Weir River, Table 20's description for Plumbush Creek, and Table 21's designations for Eagle Hill River, Third Creek, Roger Island River, Rowley River, Egypt River, Mud Creek, Pine Island Creek, Little Pine Island Creek, and Jericho Creek.*

**EPA's response:** EPA addresses most this portion of Suffolk's comment in response to Comment 2.1., above. In addition, EPA responds here to Suffolk's point regarding the way in which Massachusetts expressly designates "coastal" and "inland" portions of a waterway or waterbody. EPA notes that the water quality standards language in question, i.e., "Belle Isle Inlet and tributaries thereto," makes no distinction of the kind that Suffolk asserts is typical in the Massachusetts standards. Suffolk's argument thus seems to support the opposite conclusion of the one Suffolk asserts. That is, because the language in question refers to Class "SA" and contains no reference to "inland water" tributaries, the better reading of the language is that it includes the tributary Sales Creek within the Class SA designation. Further, EPA reiterates here that the presence of a tidal gate alone, without further information is not sufficient to conclude that Sales Creek is not affected by the tidal influences of Belle Isle Inlet.

- b. **Suffolk's comment (footnotes omitted):** *The Fact Sheet asserts that Sales Creek has State Basin Code MA-70-10. According to MassDEP's Massachusetts 2012 List*

*of Integrated List of Waters (Jan. 2012) (“MassDEP 2012 List,” Appendix, Exhibit 5), Basin MA-70-10 is for an area of Boston Harbor “From the tidal flats at Coleridge Street, Boston (East Boston) to a line between Logan International Airport and Point Shirley, Boston/Winthrop.” Id. at 108. The MassDEP 2012 List denotes “Sales Creek” as Basin MA-71-12, and describes Sales Creek as follows: “Headwaters near Route 145, Revere to tidegate/confluence with Belle Isle Inlet, Boston/Revere.” Id. At 67. The drainage area attributed to the “upstream” portion of Sales Creek is 0.008 square miles, the identical area reported in the Fact Sheet. See id.*

**EPA’s response:** EPA agrees that MassDEP’s Massachusetts 2012 List of Integrated Waters (January 2012) denotes Sales Creek as basin MA-71-12 and describes it as “Headwaters near Route 145, Revere to tidegate/confluence with Belle Isle Inlet, Boston/Revere.” EPA notes, however, that correction of the factual error in the Fact Sheet does not entail any change to the terms and conditions of the permit.

- c. **Suffolk’s comment (footnotes omitted):** *In April 1998, the Agencies issued to Global REVCO Terminal, LLC, located in Revere, a NPDES permit (NPDES Permit No. MA0003298<sup>9</sup>) allowing stormwater discharges into Sales Creek. The Agencies renewed that permit in 2005. Suffolk Downs has reviewed EPA’s files pertaining to the Global REVCO permit, and has found no suggestion that either Agency ever considered in connection with Global REVCO Sales Creek to be a “tributary” of Belle Isle Inlet for purposes of the latter’s Class SA/ORW designation. See Appendix, Exhibit 2; see also Fact Sheet, NPDES Permit No. MA0003298, 4 (2005) (recognizing that Sales Creek eventually flows into Belle Isle Marsh “and from there into Winthrop Harbor...a Class SB water body”); id. At 10 (noting same designation); id. at 11 (noting that proposed renewal of permit “is not being considered in isolation,” but rather in the context of “all potential direct dischargers” into Boston Harbor).*

**EPA’s response:** EPA agrees that the Global REVCO permit that expired on August 30, 2010 allowed stormwater discharges to Sales Creek, and that for purposes of that permit, EPA and MassDEP did not consider Sales Creek a Class SA water. However, EPA has recently renewed the Global REVCO Terminal permit. During the renewal process (draft permit, public hearing, and final permit), EPA referenced Sales Creek as a Class SA waterbody, consistent with MassDEP WQS and the Suffolk Downs permit.

- d. **Suffolk’s comment:** *For several years, MassDEP has recognized that the tide gate separates two waterways. Page 18 of the Fact Sheet cites MassDEP’s Mystic River Watershed and Coastal Drainage Area 2004-2008 Water Quality Assessment Report (Mar. 2010) (“Mystic River Report”), which designates “Sales Creek” as Basin MA71-12, and describes it in the same manner as the MassDEP 2012 List. See*

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<sup>9</sup> All referenced Massachusetts NPDES permits and supporting materials are available through Region 1’s website, [www.epa.gov/region1/npdes/mass.html](http://www.epa.gov/region1/npdes/mass.html).

*Mystic River Report at 36. The Report calls Sales Creek a “Class B” water, and not an ORW. The Report calls the waterway downstream of the tide gate “Belle Isle Inlet,” and gives it a different basin number, MA71-14. That basin is classified as a Class SA/ORW. See id. at 37.*

*As page 18 of the Fact Sheet admits, following publication of the Mystic River Report, MassDEP issued an “Errata Sheet,” available at [www.mass.gov/dep/water/resources/71er0610.htm](http://www.mass.gov/dep/water/resources/71er0610.htm). The Errata Sheet claims that the Report’s classification of MA71-12 is incorrect. The Errata Sheet asserts that the Mass. WQS already had classified MA71-12 as “Class SA/ORW” because it was a “tributary” to Belle Isle Inlet. The Errata Sheet does not state who concluded that Sales Creek was a Class SA/ORW tributary to Sales Creek. The Errata Sheet goes on to admit that basin MA71-12 is “separated from Belle Isle Inlet by a tidal gate and does not function as a tidal system. It is recommended that this waterbody be reclassified in the next revision of the [Mass. WQS] as a Class B/ORW.”<sup>10</sup> (Emphasis added.)*

**EPA’s response:** EPA agrees that MassDEP’s Mystic River Watershed and Coastal Drainage Area 2004-2008 Water Quality Assessment Report (Mar. 2010) (“Mystic River Report”), designates “Sales Creek” as Basin MA71-12, and classifies that segment as a “Class B” water, and not an ORW. EPA agrees that the same report calls the waterway downstream of the tide gate “Belle Isle Inlet,” and gives it a different basin number, MA71-14, and classifies that segment as a “Class SA/ORW.” However, MassDEP issued an Errata Sheet to the March 2010 report stating that Sales Creek’s classification should read “Class SA/ORW.” EPA agrees that the Errata Sheet recommends that Sales Creek be reclassified in the next revision of the [Mass. WQS] as a Class B/ORW.” This fact, however, supports a conclusion that MassDEP interprets its existing water quality standards language to mean that Sales Creek currently is Class SA. Moreover, the water quality standards in question contains on its face the fact that “Belle Isle Inlet and tributaries thereto” are designated “ORW.” The fact that the uses of Sale Creek have not been fully assessed by MassDEP is not dispositive of the question whether MassDEP has designated

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<sup>10</sup> [Footnote 7 to Suffolk Downs’ Comment 2.1.2] While the Errata Sheet’s proposed designation of its basin MA71-12 as a Class B waterway appears to be correct, see 314 CMR 4.05(3)(b), the Errata Sheet gives no explanation for why MA71-12 would qualify as an ORW under the Mass. WQS. The ORW designation requires nomination as such. See 314 CMR 4.06(1)(d)(2). Table 15 does not answer this question, as it defines the Belle Isle Inlet ORW in terms of its “Class SA” waters. As explained above, Sales Creek upstream of the tidal gate cannot be a Class SA water, as it is not tidally influenced. When MassDEP designates an entire waterway as an ORW, regardless of its class, it lists the waterway without an associated class designation. See, for example, 314 CMR 4.06, Table 17 (designation of three “tributaries” to the Nissitissit River). Moreover, MassDEP designates ORWs “based on their outstanding socio-economic, recreational, ecological and/or aesthetic values.” 314 CMR 4.04(3). As of January 2012, MassDEP had not assessed the uses or values of Sales Creek, see MassDEP 2012 List at 67, and so the Errata Sheet’s suggestion that Sales Creek has qualified (or could qualify) for ORW designation is dubious.

Suffolk Downs has asked MassDEP to produce all records pertaining to any nomination of Sales Creek as an ORW, but has received no such records. See Appendix, Exhibit 2

Sales Creek as an ORW. According to MassDEP, “Belle Island Inlet and tributaries thereto”, including Sales Creek, were designated as an ORW in the 1990 revisions to the MSWQS because they are part of the Rumney Marsh ACEC.<sup>11</sup>

- e. **Suffolk’s comment:** *In May 2008, EPA Region 1 (with the assistance of MassDEP) issued an administrative order to Suffolk Downs concerning its discharges to Sales Creek. The administrative order states that the Mass. WQS classified Sales Creek as a “Class B” waterway. See Findings of Violation and Order for Compliance, In the Matter of Sterling Suffolk Racecourse, LLC, EPA Region 1 Docket No. 08-015, 34 (May 2, 2008) (Appendix, Exhibit 6).*

**EPA’s response:** EPA agrees that the administrative order issued to Suffolk Downs in May 2008 states that Sales Creek is a surface water body designated as Class B pursuant to the Mass. Surface Water Quality Standards. The inadvertent mischaracterization of Sales Creek in the administrative order does not affect the terms and conditions of the Final Permit.

- f. **Suffolk’s comment:** *In May 2011, Suffolk Downs filed an environmental notification form (“2011 ENF”) with the Commonwealth’s Secretary of Energy and Environmental Affairs for authorization of the process-wastewater control project built in 2011-12. See Suffolk Downs Environmental Notification Form, EEA No. 14747 (May 16, 2011) (Appendix, Exhibit 7). The 2011 ENF asked Suffolk Downs to identify ORWs on or within a half-mile radius of the project site. The 2011 ENF stated: “Sales Creek (a surface water body designated as Class B pursuant to the [Mass. WQS] drains through a tide gate into the coastal waters of Belle Isle Inlet, which is an ORW. The ORW status of Sales Creek upstream of the tide gate is uncertain.” *Id.* at 5-6. The 2011 ENF was circulated to several Commonwealth agencies, including MassDEP. No one (including MassDEP) disputed the description of Sales Creek and its status. See Certificate of the Secretary of Energy and Environmental Affairs on the Environmental Notification Form, EEA No. 14747 (June 22, 2011) (Appendix, Exhibit 8).*

**EPA’s response:** EPA does not have direct knowledge of all of the facts stated by Suffolk in this section of its comments. However, assuming for purposes of this response (only) that all of Suffolk’s factual assertions are true, such truth would not entail a conclusion that Sales Creek is a Class B water and is not an ORW. The fact that Massachusetts did not correct Suffolk’s mischaracterization of MassDEP’s classification of Sales Creek in the ENF does not and cannot, as a legal matter, alter the status of Sales Creek under existing water quality standards.

- g. **Suffolk’s comment:** *In September 2012, MassDEP issued the ARD for the Draft Permit. Page 2 of the ARD states (emphases added):*

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<sup>11</sup> See <http://www.mass.gov/eea/docs/dcr/stewardship/acec/listacec.pdf>

*[Suffolk Downs] is bisected by Sales Creek, a small (0.008 square mile) fresh water body classified as Class B/ORW<sup>[12]</sup> in the Massachusetts Surface Water Quality Standards (314 CMR 4.00) Sales Creek enters the facility through a culvert and surfaces in the infield of the racetrack before being culverted again and draining (from the west side of Bennington Avenue) to Belle Island [sic] Inlet, an outstanding resource marine water (ORMW).*

*Page 5 of the ARD treats Sales Creek as separate from Belle Isle Inlet (emphasis added):*

*The MassDEP evaluated and developed a comprehensive list of the [Commonwealth's] assessed waters and the most recent list was published in the Massachusetts Year 2008 Integrated List of Waters. The Commonwealth has not assessed Sales Creek's uses nor has a TMDL been developed for it. The Massachusetts Year 2008 Integrated List of Waters... identifies Winthrop Bay and Belle Isle Inlet (the closest water bodies to Sales Creek evaluated by MassDEP) as impaired.*

**EPA's response:** EPA agrees that the Antidegradation Review and Determination, issued by MassDEP in September 2012, states that Sales Creek is a Class B water.

### **Comment 2.1.3 The Mass. WQS's Class SA and ORW Standards Do Not Govern Sales Creek; Class B/High Quality Waters Standards Apply**

The facts set forth above show that it is incorrect to interpret Table 15's Class SA/ORW "tributaries" of Belle Isle Inlet as including Sales Creek. While the Errata Sheet recommends that the upstream portions of Sales Creek be "reclassified," the evidence presented above shows that the Commonwealth never has classified Sales Creek under 314 CMR 4.06 in the first place.

314 CMR 4.06(4) provides that when 314 CMR 4.06 and its tables do not designate a waterway, such waters "are Class B, and presumed High Quality Waters for inland waters." In other words, the "reclassification" described in the Errata Sheet need not occur: Sales Creek (by virtue of 314 CMR 4.06(4)) is presumed to be Class B/High Quality Water.

### **Response 2.1.3**

See generally EPA's responses to Comment 2.1 and 2.2, above. Moreover, EPA disagrees with Suffolk's contention that Sales Creek is not currently designated, and is therefore, by default, Class B pursuant to 314 CMR 4.06(4). As discussed in earlier responses, Sales Creek is designated Class SA because it is a tributary to Belle Isle Inlet.

### **Comment 2.2. The Fact Sheet Fails to Define the Regulated Facilities Consistently**

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<sup>12</sup> [Footnote 8 to Suffolk Downs' Comment 2.1.2]: See the discussion of the ORW topic in note 7 above.

The Fact Sheet employs multiple terms (“Suffolk,” “Suffolk Downs,” “CAFO,” the “facility,” “Production Area,” and “Non-Production Area”) to identify entities and areas that will be subject to the final NPDES permit. In doing so, the Fact Sheet leaves the impression that the permit will cover areas and activities that are not subject to the CWA or the Mass. WQS. See Fact Sheet at 6 (“The CWA’s NPDES program regulates the discharge of pollutants from point sources to waters of the United States.”) (emphases added); 314 CMR 4.03(1)(a) (Mass. WQS “limit or prohibit discharges of pollutants to surface waters”) (emphasis added).

The Consent Decree’s terms are more precise. The Consent Decree uses the terms “Suffolk” or “Suffolk Downs” only to identify the owner of the regulated facilities. See Appendix, Exhibit 1. The Consent Decree uses the term “Facility” to refer to all of the property and facilities owned by Suffolk Downs, regardless of whether they are regulated. Finally, the Consent Decree uses the terms “Production Area” and “Non-Production Area” to refer to the specific facilities that are subject to the Consent Decree. The Consent Decree also identifies the boundaries of the “Production Area” and “Non-Production Area” by reference to Figure 2 of the Nutrient & Stormwater Management Plan attached as Appendix A to the Consent Decree. That same figure (with handwritten changes added by the Agencies, some of which designate problematic testing locations, see Comments 3.4, 3.5.2 n.13, and 3.5.3 n.14) is Figure 1 to the Draft Permit.

The Draft Permit is more precise than the Fact Sheet. The Draft Permit uses only the terms “Suffolk” and “permittee” to refer to the owner of the regulated facilities, and relies mostly on the terms “Production Area” and “Non-Production Area” to describe the areas contributing to regulated point sources.<sup>13</sup> The Draft Permit nevertheless does not expressly define “Production

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<sup>13</sup>[Footnote 9 to Suffolk Downs’ Comment 2.1.3] The Draft Permit nevertheless contains several instances of loose terminology:

- Footnote 3 to the table that appears on page 3 of the Draft Permit, footnote 4 to the table that appears on page 4 of the Draft Permit, and footnote 4 to the table that appears on page 5 of the Draft Permit call for reporting data from a rain gauge to be located “at the CAFO....” The words “in the Production Area” should replace “at the CAFO” in all three footnotes.
- Parts I.A.11.a., b., c., e., f., and I.A.16 of the Draft Permit refer to something called “Suffolk’s CAFO.” In each instance, “CAFO” or “Suffolk’s CAFO” should be “Production Area.”
- Part I.A.11.g. states: “This permit does not authorize discharges of pollutants from the Production Area of Suffolk’s CAFO....” The words “of Suffolk’s CAFO” are superfluous and should be deleted.
- Parts I.B.1.b(1), I.B.1.b(5), and I.B.1.b(7)(i) refer to “the CAFO’s Production Area....” “CAFO’s” is superfluous and should be deleted.
- Part I.B.1.b(2)(i) refers to “the CAFO’s designated washing areas located within the Production Area.” Part I.B.1.b(6)(i)(a) refers to “the CAFO’s process wastewater retention structure....” The words “the CAFO’s” are superfluous and should be deleted.
- Part I.B.1.b(2)(iii) states: “Only track-supplied hoses may be used at the CAFO.” Part I.B.1.b(2)(vi) requires certain inspections while horses are stabled “at the CAFO until the completion of the CAFO’s annual post-season cleanup . . .” The words “in the Production Area” should replace “at the CAFO” in both sentences, and “Suffolk’s” should replace “the CAFO’s”.
- Part I.B.1.b(3)(i) refers to “The CAFO’s mortality shed....” “Suffolk’s” should replace “The CAFO’s”



Area” or “Non-Production Area.” Such areas should be defined as they are in the Consent Decree, solely by reference to Figure 1 to the Draft Permit. Part 2.D.1.a. similarly uses the term “permitted facility.” Part 1 of the Draft Permit should make it clear that the “permitted facility” refers only to the Production Area and the Non-Production Area.

## **Response 2.2.**

EPA notes Suffolk’s comments about the different terms used in the Fact Sheet. To the extent that the use of certain terms in the Fact Sheet may have created any uncertainty EPA here affirms that the terms and conditions of the permit (which Suffolk asserts are clearer) should control.

In terms of Suffolk’s comments on the permit itself, it is not clear to EPA whether one of Suffolk’s specific comments is intended to relate to an asserted lack of specific definitions of the terms “Production Area” and “Non-Production Area” and/or whether Suffolk’s comment is intended to mean that the precise boundaries of those two areas are not clearly delineated by the Draft Permit. EPA responds here to both interpretations of Suffolk’s comment.

First, the term “Production Area” is actually defined in the Draft Permit (and is now also defined in the Final Permit) in Part II, Standard NPDES and CAFO conditions and definitions. This definition is required to be in the Final Permit because it is contained in EPA’s CAFO regulations at 40 C.F.R. § 122.23(b)(8). The term “Non-Production Area” is not a defined term in EPA’s regulations; therefore, the Final Permit does not contain a specific definition of that term. However, to the extent that Suffolk’s comment is intended to mean that the Final Permit should clearly delineate the boundaries of each of the two areas in question, EPA agrees that, in fact, the “Production Area” and “Non-Production Area” boundaries are consistent with those shown in Figure 1 of the Final Permit (which was also Figure 1 of the Draft Permit). This understanding is also consistent with the terminology Suffolk supplied in Comment 1.2 above. EPA notes, however, that should practices at the facility change, such that areas currently outside the areas currently determined to be Suffolk’s production area meet the definition of “Production Area” as found in 40 C.F.R. §§ 122.23(b)(8) and 412.2(h), then any discharges from those areas would also be subject to the requirements of 40 C.F.R. Part 412, Subpart A, even though they are identified as “Non-Production Area” in Suffolk’s comment. To clarify that any such discharges would not be authorized by the Final Permit, absent modification and/or reissuance of the permit, EPA has added a provision prohibiting any discharge of process wastewater not otherwise authorized by the permit (see Part I.A.13. of the Final Permit).

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- Part I.B.1.b.(4)(i)(a) refers to “process wastewater retention structures at the CAFO facility....” Parts I.B.1.b.(4)(ii) and b(5) refer to other practices when horses are stabled (or not) “at the CAFO....” Part I.B.1.b.(7)(i) refers to “the roofs of structures at the CAFO....” The words “in the Production Area” should replace “at the CAFO facility” and “at the CAFO”.
  - Part I.B.1.b.(7)(ii) refers to the “CAFO’s process wastewater retention structure....” “Production Area’s” should replace “CAFO’s.”
  - Part I.B.1.b(7)(iv) requires inspections of “[g]utters and downspouts....” The words “on structures in the Production Area” should be inserted after “downspouts”.
  - Parts I.B.1.b(11)(v) and (xiv), and Parts I.E.3.b.(i) and (ii), refer to “the CAFO facility....” “Production Area” should replace “CAFO facility”.

EPA agrees that the Final Permit should contain clear, specific, consistent, and easily understood terms. While EPA does not believe that the specific terms of the Draft Permit objected to by Suffolk in Comment 2.2 would, as a practical matter, result in confusion as to the scope of the permit's requirements and to which areas and/or structures those requirements apply, EPA has changed the terminology as used in the Final Permit to be consistent with Suffolk's comments in footnote 9 to Comment 2.2 for purposes of greater simplicity and clarity. For example, in some instances the use of the term "Production Area" in the draft permit conflated the term as used by Suffolk with the term as defined in the federal regulations, creating an unintended conflict in the use of the term, and so the provisions of the Final Permit have been edited to eliminate such ambiguity. Finally, to the extent that the terminology EPA used in its Fact Sheet created any other ambiguity along the lines suggested by Suffolk's comment, the clarifications in the Final Permit and explanation in this response should be sufficient to remedy that ambiguity, as well.

### **Comment 2.3. The Fact Sheet Erroneously Describes Drainage and Flows**

The Fact Sheet contains erroneous descriptions of the drainage areas and flows contributing to many of the outfalls identified in the Draft Permit. The Fact Sheet also ignores significant characteristics of discharges from those outfalls.<sup>14</sup> These errors and omissions are best understood in the context of Part III.A.1, Table 1 of the Fact Sheet (Fact Sheet, pages 9-10).

### **Response 2.3.**

In response to Suffolk's comments about the erroneous descriptions of the facility's drainage outfalls and flows, EPA has, as appropriate, amended the version of Table 1 that was included in the Draft Permit's Fact Sheet and has included that amended table as an attachment to the Final Permit. The specific amendments to Table 1, and any associated changes to the permit itself, are described below in EPA's responses to Suffolk's more specific Comments 2.3.1 to 2.3.11. EPA notes here, however, that while the Fact Sheet may have contained certain misstatements of fact, correction of those misstatements in this RTC document for the administrative record did not, in all cases, necessitate any changes to the terms and conditions of the permit (as explained below).

#### **Comment 2.3.1 NPDES Outfall 001**

Table 1 describes this outfall as "Sediment basin drainage channel located on the northern bank of Sales Creek where Sales Creek flows above ground in the Track Area in-field. Discharge: overflow from Production Area wastewater storage pond." Table 1 identifies Outfall 001 as being the same outfall as Suffolk PWP-1. The reference to PWP-1 is incorrect and should be removed from Table 1. Suffolk's PWP-1 does not discharge to Sales Creek. See Affidavit of Kenneth Deshais ("Deshais Affidavit," Appendix, Exhibit 9).

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<sup>14</sup> [Footnote 10 to Suffolk Downs' Comment 2.3] A minor item appears on page 4 of the Fact Sheet, which refers to "contaminated process wastewater." By definition, the CWA regulates all "process wastewater" as a pollutant, regardless of whether it is "contaminated."

Instead, PWP-1 is at the end of a 30-inch pipe that discharges process wastewater from the Production Area to the Storage Pond.<sup>15</sup> See *id.* By contrast, Outfall 001 is a riprap slide that leads to a vegetated swale. See *id.* The swale connects to Sales Creek. See *id.*

As will be discussed in Comment 3.4 below, there is no evidence that Outfall 001 is reasonably likely to discharge to Sales Creek.

### **Responses 2.3.1.**

See EPA's response to Comment 2.3, above. In addition, in response to Suffolk's specific comment, EPA has deleted the reference to Suffolk's nomenclature "PWP-1" from Table 1 and has replaced the descriptive text "sediment basin drainage channel" with the text "(R)iprap slide that discharges to a vegetated swale which, in turn, connects to Sales Creek." EPA also notes Suffolk's comment in footnote 11, but responds that none of the factual corrections relevant to this comment warranted any change to the terms and conditions of the permit; nor did Suffolk's comment seek any such change.

EPA addresses in its response to Comment 3.4 below Suffolk's assertion that "there is no evidence that Outfall 001 is reasonably likely to discharge to Sales Creek."

### **Comment 2.3.2 NPDES Outfall 002**

Table 1 describes this outfall as "Sediment drainage swale located on the northern bank of Sales Creek (downstream of PWP-1) where Sales Creek flows above ground in the Track Area in-field. Discharge: Overflow from Production Area wastewater storage pond." Table 1 identifies Outfall 002 as the same outfall as Suffolk PWP-2. The reference to PWP-2 is incorrect and should be removed from Table 1. Suffolk's PWP-2 does not discharge to Sales Creek. See Deshais Affidavit. Instead, PWP-2 is at the end of an eighteen-inch pipe that discharges process wastewater from the Production Area to the Storage Pond. By contrast, Outfall 002 is a riprap slide that leads to a vegetated swale. The swale connects to Sales Creek. See *id.*

As will be discussed in Comment 3.4 below, there is no evidence that Outfall 002 is reasonably likely to discharge to Sales Creek.

### **Response 2.3.2.**

See generally EPA's response to Comment 2.3, above. In addition, in response to Suffolk's comment, EPA has deleted the reference to Suffolk's nomenclature "PWP-2," from Table 1 and

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<sup>15</sup> [Footnote 11 to Suffolk Downs' Comment 2.3.1] A related minor item appears on page 8 of the Fact Sheet, where it asserts that MassDEP has issued a permit allowing Suffolk to discharge process wastewater to the "MWRA" sewer system. More precisely, MassDEP's permit allows Suffolk to discharge process wastewater to sewers that the Boston Water & Sewer Commission operates. See Massachusetts Department of Environmental Protection, Sewer Connection Permit No. X251196 (Boston) (Aug. 1, 2012) (Appendix, Exhibit 10). Those sewers lead, in turn, to MWRA facilities. See *id.*

has replaced the descriptive text “sediment basin drainage channel” with the text “(R)iprap slide that discharges to a vegetated swale which, in turn, connects to Sales Creek.”

EPA notes that the factual correction identified by Suffolk does not warrant any change to the terms and conditions of the permit; nor did Suffolk’s comment seek any such change.

EPA addresses in its response to Comment 3.4 below Suffolk’s assertion that “there is no evidence that Outfall 002 is reasonably likely to discharge to Sales Creek.”

### **Comment 2.3.3. NPDES Outfall 003**

Table 1 describes this outfall as “Outfall (flow-through pit) located in the wetlands adjacent to Sales Creek. Discharge: Production Area (roof runoff) stormwater.” As Suffolk Downs previously has disclosed to the Agencies, there is at least one drain line located outside of Suffolk’s property that contributes flows to a Suffolk-owned drain line that empties at Outfall 003. See Deshais Affidavit. Because Outfall 003 is submerged, it is impossible to tell whether Suffolk’s drain line, or off-site drains that connect to Suffolk’s line, pick up groundwater even during dry weather. See *id.* It is also likely that Suffolk’s drain is picking up groundwater from Suffolk’s property. See *id.* Nevertheless, the only “Production Area stormwater” that Suffolk contributes to the drain line leading to Outfall 003 is roof runoff. See *id.* Following the 2011-2012 construction, horses do not affect the discharges at Outfall 003. See *id.*

### **Response 2.3.3.**

See generally EPA’s response to Comment 2.3, above. In addition, in response to Suffolk’s comment, Table 1 now includes a description of Outfall 003 that reads: “Production Area (roof runoff) stormwater and subsurface infiltration.” Also in response to Suffolk’s comment, Part I.A.2.a. of the Final Permit includes subsurface infiltration as an authorized discharge through Outfall 003. Unlike the Draft Permit, the Final Permit does not contain a prohibition on all dry weather discharges in order to account for the possibility that groundwater infiltrates Suffolk’s storm drainage system even during dry weather conditions.

EPA further addresses the issue of subsurface infiltration discharge in its response below to Comment 3.3.

There is no need to change the permit language regarding stormwater that may potentially be contributed from off-site sources, since the Final Permit authorizes “stormwater” discharges from this outfall. The Final Permit also requires monitoring for this outfall under both dry and we weather conditions (see Parts I.A.2.a. and I.A.3.). EPA does not believe additional monitoring is necessary to characterize flow that may include contributions from off-site sources, since such flows are regulated pursuant to the City of Revere’s Municipal Separate Storm Sewer System (MS4) general permit.

### **Comment 2.3.4. NPDES Outfall 004**

Table 1 describes the discharge from this outfall as “Non-Production Area stormwater from the grandstand, paved track maintenance area and paved parking area.” Groundwater also infiltrates the drain line leading to this outfall. See Deshais Affidavit. Parts III.A.2. and IV.C.2.a. of the Fact Sheet erroneously state that prior to 2011-12, Outfall 004 discharged process wastewater and runoff from the racetrack. Process wastewater and racetrack runoff never have discharged through Outfall 004. See Deshais Affidavit. Horses never have had contact with any of the water that discharges at Outfall 004. See id.

#### **Response 2.3.4.**

See generally EPA’s response to Comment 2.3, above. In addition, in response to Suffolk’s comment, EPA has amended Table 1 to indicate that infiltrated groundwater is present in the discharge from Outfall 004. Also in response to Suffolk’s comment, Part I.A.2.a. of the Final Permit includes subsurface infiltration as an authorized discharge through Outfall 004. The Final Permit does not contain a prohibition on all dry weather discharges in order to account for the possibility that groundwater infiltrates Suffolk’s storm drainage system even during dry weather conditions.

EPA notes Suffolk’s correction of certain misstatements in the Fact Sheet regarding EPA’s earlier belief that “process wastewater and racetrack runoff” historically had been discharged through Outfall 004. However, EPA also notes that these factual corrections do not warrant any change to the terms and conditions of the permit; nor did Suffolk’s comment seek any such change in relation to correction of those misstatements about historical discharges from Outfall 004.

EPA further addresses the issue of subsurface infiltration discharge in its response below to Comment 3.3.

#### **Comment 2.3.5. NPDES Outfall 005**

Table 1 notes that the sole discharge to Outfall 005 is “Production Area (roof runoff) stormwater.” There also appears to be groundwater infiltration to the line discharging at Outfall 005. See Deshais Affidavit. Horses have had no contact with that runoff since the 2011-2012 construction. See id. The discussion of Production-Area runoff in Part IV.B.3.iii of the Fact Sheet overlooks that fact.

#### **Response 2.3.5.**

See generally EPA’s response to Comment 2.3, above. In addition, in response to Suffolk’s comment that the Fact Sheet overlooks the fact that horses have had no contact with Production Area roof runoff since the 2011-2012 construction (nor does EPA have any reason to believe that manure, litter, or process wastewater, or other materials, such as bedding and feed, are commingled with this roof runoff), EPA clarifies here that the Fact Sheet discussion identified in Suffolk’s comment is specific to the historical presence of aluminum in monitoring results from wet weather discharges from Outfalls 003, 005 and 007. The section of the Fact Sheet in question does not, and was not intended to, address post-construction conditions at Outfall 005.

Moreover, that particular factual issue is not relevant in any way to the specific terms and conditions of the permit; nor has Suffolk asked for a change to the conditions of the permit based on that specific factual point. However, in response to the separate point in Suffolk's comment that there "appears to be groundwater infiltration," Table 1 (of the Final Permit) has been amended to indicate that subsurface infiltration is a component of the authorized discharge through Outfall 005. Also in response to Suffolk's comment, Part I.A.2.a. of the Final Permit includes subsurface infiltration as an authorized discharge through Outfall 005.

EPA further address the issue of subsurface infiltration in its response below to Comment 3.3.

#### **Comment 2.3.6. NPDES Outfall 006**

Table 1 acknowledges that Outfall 006 consists of multiple pipes located on the eastern bank of Sales Creek. Prior to Suffolk's 2011-2012 construction activities, there were two such pipes, an eight-inch line and a 24-inch line. See Deshais Affidavit. Both discharged to a tributary stream that passed through vegetated wetlands adjacent to the eastern bank of Sales Creek. See *id.* Outfall 006 was partially submerged, and received surface runoff from adjacent uplands. See *id.* Prior sampling at Outfall 006 has occurred in the mixing zone of the two pipes. See *id.*

Prior to construction in 2011-2012, the eight-inch pipe discharged road runoff from Tomasello Way and publically owned Revere Beach Parkway/Winthrop Avenue, as well as minor amounts of sheet flow originating from a small portion of the Production Area. See *id.* The 24-inch pipe discharged runoff from the Production Area as well as road runoff generated along Revere Beach Parkway/Winthrop Avenue and a portion of Washburn Avenue. See *id.* Road runoff entered the 24-inch pipe through multiple connections within the Suffolk Downs property. See *id.* Dry-weather observations of the discharges from the 24-inch pipe prior to 2011-12 suggest that groundwater also was infiltrating the pipe. See *id.*

The 2011-2012 construction did not change the characteristics of the immediate area around Outfall 006. The eight-inch pipe at Outfall 006 still continues to discharge runoff generated from Tomasello Way and Revere Beach Parkway/Winthrop Avenue. See *id.* The eight-inch pipe no longer receives any substantial sheet flows from the Production Area. See *id.* The 24-inch pipe discharges runoff from the aisle parking area and roadway on the north side of Suffolk Downs (an area now designated as Non- Production Area), but only if such runoff exceeds the infiltration capacity of three infiltration islands. See Fact Sheet at 13<sup>16</sup>; Deshais Affidavit. Any excess capacity discharges directly to the 24-inch drain line at Outfall 006, and never enters Suffolk's process-water diversion system. See *id.* The 24-inch pipe also receives roof runoff from certain buildings within the Production Area. The 24-inch pipe continues to discharge road runoff generated in Revere Beach Parkway/ Winthrop Avenue and a portion of Washburn Avenue. See *id.* As Suffolk's 2011-2012 construction did not replace the eight- or 24-inch lines

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<sup>16</sup> [Footnote 12 to Suffolk Downs' Comment 2.3.6]] The last sentence of Part III.A.2.a.ii. of the Fact Sheet erroneously suggests that runoff that exceeds the capacity of the infiltration islands discharges to Outfall 006 "via the diversion system." Any excess capacity discharges directly to the 24-inch drain line, and never enters the process-water diversion system. See Deshais Affidavit.

(or an eighteen-inch line that is the principal connection to the 24- inch line), the eight- and 24- inch lines likely continue to discharge groundwater. See *id.*

Table 1 notes that the discharges at Outfall 006 are now “Production Area (roof runoff) and Non-Production Area (northern aisle parking and roadway) stormwater runoff.” All Production Area runoff originates solely on roofs of buildings within the Production Area. Horses have had no contact with that runoff since the 2012 construction. See *Deshais Affidavit*. The discussion of Production-Area runoff in Part IV.B.3.iii of the Fact Sheet overlooks that fact.

### **Response 2.3.6.**

See generally EPA’s response to Comment 2.3, above. It is not clear to EPA what changes, if any, to the permit Suffolk is seeking through this comment. For example, the first two paragraphs contain a factual description of the discharges through 8-inch and a 24-inch pipes *prior to construction of facility changes in 2011-2012*. In addition, Suffolk identifies road runoff that enters the 24 inch pipe. Although EPA is not able to discern why this information is being conveyed by Suffolk in this comment EPA has no reason to dispute Suffolk’s description, but, at the same time, EPA does not envision any changes to the terms and conditions of the permit as a result of this factual information.

Similarly, it is not clear to EPA what Suffolk is seeking through the factual description contained in paragraph 3 of this comment (with the one exception of the reference to subsurface infiltration). As noted in earlier responses, in response to Suffolk’s comments the Final Permit does include subsurface infiltration as an authorized discharge (in this case through Outfall 006).

Finally, it appears that Suffolk’s only objection in the fourth and final paragraph of this comment consists of Suffolk’s assertion that a particular section of the Fact Sheet overlooks the fact that since Suffolk completed the 2011-2012 construction at the permitted facility, runoff from the roofs of buildings in the Production Area does not come into contact with horses nor with any materials that would cause it be considered process wastewater, such as manure, bedding, feed, or process wastewater. EPA has no reason to dispute Suffolk’s factual assertion, but this factual point does not warrant any change to the terms and conditions of the permit; nor has Suffolk requested any such change through this comment.

In response to Suffolk’s comments about the 8-inch and 24-inch pipes that discharge to a tributary stream that flows through vegetated wetlands adjacent to the eastern bank of Sales Creek, Parts I.A.2.a and I.A.3 of the Final Permit and Table 1 (which is now an attachment to the Final Permit) include an “Outfall 006A,” the 8-inch pipe that discharges Production Area stormwater runoff and off-site roadway stormwater runoff. The 24 inch pipe is now referred to as “Outfall 006” in the Final Permit and in Table 1 to the Final Permit.

In response to footnote 12 to Suffolk’s Comment 2.3.6, EPA here acknowledges that Part III.A.2.a.ii. of the Fact Sheet erroneously suggested that runoff exceeding the capacity of the infiltration islands in question discharges to Outfall 006 “via the diversion system,” and EPA now understands that any excess capacity discharges directly to the 24-inch drain line, and never enters the process-water diversion system. EPA notes, however, that this earlier factual

misunderstanding and its correction here does not affect in any way the actual permit terms and conditions; nor has Suffolk requested any such change through this comment.

In response to Suffolk's specific comment that the discussion at Part IV.B.3.iii of the Fact Sheet "overlooks" the fact that, as to Outfall 006, all Production Area runoff originates solely on building roofs and has had no contact with horses since Suffolk's 2012 construction efforts (nor, as stated above, does EPA have any reason to believe that manure, litter, or process wastewater, or other materials, such as bedding and feed, are commingled with this roof runoff), EPA notes that the discussion at Part IV.B.3.iii. of the Fact Sheet is specific to the historical presence of aluminum in the monitoring results from wet weather discharges from Outfalls 003, 005 and 007, and does not pertain to Outfall 006 at all. To the extent that may not have been clear in the Fact Sheet, EPA's response here clarifies that point. As noted earlier in the RTC, EPA addresses the issue of subsurface infiltration below in its response to Suffolk's Comment 3.3.

**Comment 2.3.7. NPDES Outfall 007**

Table 1 asserts that the discharge at Outfall 007 includes "Non-Production Area runoff from the racetrack entrance, track maintenance areas, parking area and racetrack material stockpile area." The second sentence in the last paragraph of Part III.A.2.b of the Fact Sheet (page 14) erroneously suggests that the drainage area includes "a parking area west of the track maintenance area." As part of its 2011-2012 construction, Suffolk Downs substantially diverted the runoff from the parking area, located west of the fence that separates the track maintenance area from the parking area, away from the track maintenance area. See Deshais Affidavit. The parking area's runoff no longer can reach Outfall 007. See id.

**Response 2.3.7.**

The drainage area for Outfall 007 was described in the Fact Sheet (the second sentence in the last paragraph of Part III.A.2.b, Page 14) as it was described by Suffolk itself on Page 9 of its August 2012 Nutrient & Stormwater Management Plan (NSMP). Now that Suffolk has pointed out that factual inaccuracy contained in its NSMP, Table 1 of the Fact Sheet, which is included as an attachment to the Final Permit, has been written to reflect the fact that the discharge from Outfall 007 does not include drainage water from the "parking area west of the track maintenance area." Again, EPA notes here that this factual correction does not affect in any way the Final Permit's terms and conditions; nor has Suffolk requested any such change through this comment. In fact, the Final Permit's terms and conditions would be the same whether or not Outfall 007 discharges drainage water from the "parking area west of the track maintenance area."

**Comments 2.3.8., 2.3.9., and 2.3.10. NPDES Outfalls 008, 009, and 010**

While the Fact Sheet's descriptions of the locations of Outfalls 008, 009 and 010 are correct, the Fact Sheet describes their discharge as "Track Area industrial stormwater." That statement is only partially correct. Each of these outfalls drains a BMP sand filter. See Deshais Affidavit. The sand filter underdrains are reasonably likely to pick up groundwater, which in turn commingles with track runoff that has entered the sand filter. Outfalls 009 and 010 also are outlets for an underdrain system that is beneath the Storage Pond. See id.



**Responses 2.3.8., 2.3.9., and 2.3.10.**

As noted in earlier responses, Table 1 to the Final Permit and the Final Permit itself reflect the fact that subsurface infiltration is an authorized discharge (in this case from Outfalls 008, 009, and 010).

EPA addresses the issue of subsurface infiltration below in its response to Suffolk's Comment 3.3.

**Comment 2.3.11. NPDES Outfall 011**

Table 1 erroneously describes Outfall 011 as "Sediment basin drainage swale located on the southeast side of Sales Creek where Sales Creek flows above ground in the Track Area in-field and towards Walley Street." There is no drainage swale near Outfall 011. Following construction, the outfall is a six-inch solid PVC pipe connected to the underdrain of the sand filter identified as BMP-5. See Deshais Affidavit. Prior to Suffolk's 2011-2012 construction activities, Outfall 011 consisted of a twelve-inch corrugated plastic pipe that connected to a concrete vault in the vicinity of BMP-5. The vault received runoff from the racetrack's drain system. Following construction in 2011-12, Outfall 011 discharges track runoff and any groundwater that enters BMP-5's underdrain. See id.

**Response 2.3.11.**

In response to Suffolk's comment, EPA has amended the text in Table 1 (included as an attachment to the Final Permit) relating to the location and description of Outfall 011 to read "Outfall pipe from sand filter to southwest side of Sales Creek where Sales Creek flows above ground in the Track Area infield, near Washburn Street. Discharge: Track Area industrial stormwater and subsurface infiltration." EPA notes, as it has in response to other similar comments submitted by Suffolk regarding the Fact Sheet's factual characterizations, that correction of the factual misstatement does not warrant any change to the terms and conditions of the permit; nor does Suffolk's comment request any such change.

As noted earlier in this RTC document, EPA addresses the issue of subsurface infiltration below in its response to Comment 3.3.

**Comment 2.4. The Fact Sheet Ignores Permissible Dry-Weather Flows**

While the Fact Sheet asserts that the NELG imposes a "no discharge" standard, even in dry weather (Fact Sheet, page 26), the Fact Sheet's later assertion that "Dry weather discharges from all outfall are prohibited" (id. at 27) suggests misapplication of the NELG.

None of the monitored outfalls is reasonably likely to result in a discharge of process water from the Production Area, even in dry weather. See Deshais Affidavit. Moreover, as discussed in Comments 2.3.3, 2.3.4, and 2.3.6 above, Outfalls 003, 004 and 006 show signs of groundwater infiltration from areas completely outside of the Production Area (and, in the case of Outfalls 003 and 006, even outside of Suffolk Downs's property). As discussed in Comments 2.3.8

through 2.3.11 above, the BMPs in the infield of the Suffolk racetrack are similarly likely to discharge groundwater. The Draft Permit should acknowledge that the NELG has no bearing on such discharges.

#### **Response 2.4.**

When the Fact Sheet was written, EPA's permitting staff was unaware of the fact that subsurface flows infiltrate Suffolk's drainage system and eventually discharges into the receiving waters through the facility's outfalls. As noted earlier in this RTC document, in response to Suffolk's concerns regarding subsurface infiltration and the discharge of such flows through the facility's outfalls (which may occur during dry weather conditions), the prohibition of all discharges under dry weather conditions that was in the Draft Permit has not been included in the Final Permit.

EPA's response below addresses the permitted facility's Production Area and the non-Production Area separately.

#### *Production Area discharges*

The discussion at Part IV.C.1.a. and b. of the Fact Sheet (pp 25-27) was specific to Suffolk's process waste water CAFO-regulated discharges and related to the Draft Permit's requirements at Part I.A.1.a. and b., which were, in turn, applicable to Production Area process wastewater discharges from Outfalls 001 and 002. Because the facility is a CAFO, any discharge of process wastewater from the production area is subject to the "no discharge" requirements of the Effluent Limitations Guideline (NELG) for CAFOs. The applicable NELG, at 40 C.F.R. Part 412, Subpart A, provides that there shall be no discharge of process waste water into U.S. waters, with the exception that whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters. In effect, for process wastewater discharges at a CAFO the ELG does amount to a prohibition against discharges of process waste water during dry weather conditions, and that is what the Fact Sheet discussion addressed and what the Draft permit contemplated. Accordingly, the Fact Sheet's discussion specific to Outfalls 001 and 002 actually is correct. However, as noted above, discharges from outfalls 003, 005 and 006 under dry weather conditions are authorized in the Final Permit, in response to Suffolk's comments with respect to subsurface infiltration contributing flows to these outfalls.

#### *Non-Production Area discharges*

The Fact Sheet does not state, nor is it EPA's intention to imply, that the CAFO NELG establishes the effluent limitations applicable to industrial stormwater discharges from Outfalls 003-011. Thus, these discharges are not subject to the no discharge standard established by the NELG, based on Suffolk's assertions that there is no discharge of process wastewater from the production area through these outfalls. As mentioned above, in Response 2.2, should practices at the facility change, such that areas currently not determined to be Suffolk's production area meet the definition of "Production Area" as found in 40 C.F.R. §§ 122.23(b)(8) and 412.2(h), then any

discharges from those areas would also be subject to the requirements of 40 C.F.R. Part 412, Subpart A.

As noted earlier in this RTC document, the Final Permit differs from the Draft permit in that it authorizes discharges of subsurface infiltration, including during dry weather conditions. Such discharges are authorized from Outfalls 003 through 011. As a result, Suffolk's non-process wastewater regulated discharges, i.e., discharges of stormwater associated with industrial activity, water diverted from the roofs of buildings located in the Production Area, and subsurface infiltration are authorized by the Final Permit. In addition, discharges of subsurface infiltration are authorized from Outfalls 003 through 011, including during dry weather conditions.

### **Comment 2.5 Additional Data is Needed About Discharges of TSS, Bacteria and Aluminum**

The Fact Sheet frequently states that at the time the Agencies developed the Draft Permit, EPA had not received "any" discharge status report data from Suffolk Downs. Suffolk Downs does not know when the Agencies prepared the Draft Permit, but Suffolk Downs has submitted discharge sampling and other status reports concerning its Production Area and Non- Production activities at least twice prior to issuance of Joint Public Notice. See Quarterly Compliance Report, July 1, 2012 through September 30, 2012, U.S. v. Sterling Suffolk Racecourse, LLC, Docket No. 12-cv-11556 (Oct. 30, 2012); Compliance Report, October 1, 2012 through December 31, 2012, U.S. v. Sterling Suffolk Racecourse, LLC, Docket No. 12-cv-11556 (Jan. 30, 2013).

While Suffolk Downs believes that the data it has submitted so far to the Agencies permits them to draw adequate conclusions regarding the likelihood of the discharge of pollutants from certain point sources, see Comment 3.4 below, as well as the proper testing parameters for other point sources, see Comments 3.4, 3.5, 3.10 and 3.12 below, Suffolk Downs agrees that additional testing data is needed before the Agencies properly may make more permanent decisions regarding the scope of testing at Suffolk's outfalls. Suffolk Downs also proposes that the Permit include a provision for "tiered monitoring." Section 8.1.3 of the NPDES Permit Writers' Manual (EPA-833-K-10-001) allows tiered monitoring where additional testing data may show that less (or more) frequent monitoring is appropriate. "This step-wise approach could lead to lower monitoring costs for permittees while still providing the data needed to demonstrate compliance with effluent limitations." Suffolk Downs anticipates that additional data will show that both wet- and dry-weather sampling, at numerous outfalls and for numerous parameters, likely could be reduced without compromising compliance.

### **Response 2.5.**

As Suffolk notes in its comment, the Fact Sheet for the Draft Permit does state that at the time the Draft Permit was prepared, EPA had not received from Suffolk any discharge data for discharges from the facility that occurred after Suffolk constructed, installed and implemented the 2011-2012 facility improvements, which were primarily designed to reduce process wastewater discharges to Sales Creek. However, prior to the March 1, 2013 public notice date of

the Draft Permit, Suffolk submitted two quarterly compliance reports to EPA: Quarterly Compliance Report for the period July 1, 2012 through September 30, 2012, dated October 30, 2012 and Quarterly Compliance Report for the period October 1, 2012 through December 31, 2012, dated January 30, 2013. EPA notes, however, that horses were only stabled at Suffolk during three (August, September and October, 2012) of the six months covered by those two quarterly reports.

The approach EPA has taken in the Final Permit is consistent with Suffolk's comment that "*Suffolk Downs agrees that additional testing data is needed before the Agencies properly may make more permanent decisions regarding the scope of testing at Suffolk's outfalls.*" Therefore, the Final Permit contains a requirement to monitor, and to report the results of such monitoring, for specific pollutant parameters.

As to Suffolk's references in this comment to Comments 3.4, 3.5, 3.10, and 3.12, EPA responds directly to those comments elsewhere in this document.

Suffolk also asserts in this comment that the Final Permit should include a provision for "tiered monitoring." EPA has determined that written requests to reduce the wet weather monitoring requirements contained in Part I.A.2. may be considered following at least three years from the effective date of the permit. As such, language has been added to the footnotes to the tables in Parts I.A.2. of the Final Permit which reflects this determination. Additionally, the Final Permit allows for sampling of specific outfalls to be representative of specific unsampled outfalls, as described below, thereby reducing the overall monitoring requirements from what was included in the Draft Permit.

Although the discharges may have similar stormwater constituents, they may or may not have similar constituents under non-wet weather conditions. As such, with respect to the dry weather monitoring requirements found in Part I.A.3., EPA has determined that quarterly monitoring of the outfalls for a minimum of three years is appropriate. After 3 years, Suffolk may request a reduction in monitoring. EPA will evaluate any such request and respond appropriately.

**Outfalls 001 and 002:**

The Final Permit requires that Suffolk sample *either* Outfall 001 or 002 whenever a rainfall event causes an overflow of process waste water from its process wastewater retention structure. This represents a 50 % reduction from the sampling requirements for these outfalls that were proposed in the Draft Permit. As stated in the Fact Sheet, Suffolk's process wastewater retention structure is designed to contain the anticipated run-off volume from the Production Area as well as direct precipitation to the retention structure resulting from a 50-year, 24-hour rainfall event, with no discharge to Sales Creek. Because the volume of that design standard significantly exceeds the 25-year, 24-hour rainfall event design standard contained in the applicable CAFO ELG, most, if not all, discharges of process water to Sales Creek will be prevented, and consequently the number of sampling events that will need to be performed will be minimal. Accordingly, EPA has determined that a tiered wet-weather monitoring scheme, either on a seasonal basis or a multi-year basis, for Outfalls 001 and 002 would not be to be appropriate as the monitoring requirements would only apply to these outfalls when extreme rainfall events cause an overflow of the retention structure, and the occurrence of such rainfall events is not dependent on the time

of year or on the particular year in which such events occur during the Final Permit's five year term. However, EPA believes that the 50 % reduction in monitoring requirements for these outfalls is responsive to Suffolk's general concern that EPA reduce the monitoring requirements of the Final Permit from the requirements of the proposed permit.

**Outfalls 008, 009, 010, 011:**

In response to Suffolk's comments on the Draft Permit's monitoring requirements, EPA has made certain changes that are reflected in the Final Permit. Although the Final Permit retains the proposed requirement that Suffolk monitor wet-weather discharges of industrial stormwater from Outfalls 008, 009, 010 and 011 located in the Racetrack Area, the permit allows for the sampling results from outfall 011 to satisfy the monitoring requirements for outfalls 008, 009 and 010 because the discharges from these latter three outfalls are substantially identical to the discharge from Outfall 011. Thus, the sampling at Outfall 011 will be representative of the discharges from Outfalls 008, 009, and 010. Again, EPA believes that this reduction in monitoring requirements from what was proposed in the Draft Permit is responsive to Suffolk's general concern about the amount of monitoring required by the permit.

**Outfalls 003, 004, 005, 006, 006A and 007:**

EPA has retained in the Final Permit the proposed monitoring requirement for wet-weather discharges from Outfalls 003, 004, 005, 006, 006A and 007, because EPA believes the required monitoring program is necessary and appropriately designed to properly characterize the discharge from these outfalls.

Since the composition of the flows discharged from outfalls 004, 005 and 007 are expected to be similar, language has been included in the footnotes to Part I.A.2.a.2. of the Final Permit stating that Outfalls 004, 005 and 007 may be sampled on a "rotating basis", provided each outfall is sampled at a minimum of four times per year (i.e., each outfall does not need to be sampled each month), and that written requests to reduce the monitoring frequency will be considered following three years from the effective date of the permit. Here again, EPA believes that this reduction in monitoring requirements from what was proposed is responsive to Suffolk's general concern about the amount of monitoring required by the permit.

Suffolk has suggested that discharges from outfalls 003, 006 and 006A may contain flows contributed from off-site sources. Therefore, the extent to which the discharge from these outfalls vary from discharges from Outfalls 004, 005 and 007 remains uncertain at this time. As such, the monitoring requirements for Outfalls 003, 006 and 006A in the Final Permit have been placed in a table (Part I.a.2.a.1.) that is separate from those for Outfalls 004, 005 and 007 (Part I.A.2.a.2.)

**Comment 2.6. The Fact Sheet Incorrectly Calculates Sales Creek's Available Dilution**

The Fact Sheet's discussion of available dilution (page 20) contains several errors. First, the Fact Sheet asserts that the Mass. WQS establishes the hydrologic condition under which any water-quality criteria must be applied. The Fact Sheet goes on to cite 314 CMR 4.03(3)(a) as the

applicable hydrologic standard. The Fact Sheet misstates that standard. Section 4.03(3)(a) states in pertinent part (emphasis added):

For rivers and streams, the lowest flow condition at and above which aquatic life criteria must be applied is the lowest mean flow for seven consecutive days to be expected once in ten years.

Second, the Fact Sheet claims, without reference to any standard, that water quality-based limits “are then based on a dilution factor calculated using the permitted flow of the facility and the low flow condition in the receiving water.” That statement overlooks the fact that Suffolk Downs’s discharges are largely non-continuous. See 40 CFR § 122.2 (defining “continuous discharge”); *id.* at § 122.45(d) and (e) (distinguishing between continuous and non-continuous discharge). Following its 2011-2012 construction, Suffolk Downs’s “continuous” discharges are limited to relatively low amounts of groundwater, and no process wastewater whatsoever. See Deshais Affidavit. Stormwater comprises the bulk of its non-continuous discharges. Such discharges occur, by definition, during storm events. Such storm events are unlikely to occur simultaneously with a low-flow condition in Sales Creek. See *id.*

Third, the data that appears on page 20 of the Fact Sheet is incorrect. The flow from the Production Area following the 2011-2012 construction is 245,200 cubic feet per month (0.0603 MGD). See Appendix, Exhibit 4. The Fact Sheet recognizes that Suffolk Downs has diverted a substantial amount of that flow to its process-wastewater storage system. The flows that are not diverted to that system – those from rooftops of buildings in the Production Area – are approximately 98,200 cubic feet per month (0.02411 MGD). See *id.*

The Fact Sheet’s dilution calculations thus should be revised to compare apples to apples: either one must compare Sales Creek’s low-flow condition with Suffolk Downs’s permitted flows during low-flow periods (that is, its dry-weather groundwater discharges) or, if one is intent on examining Sales Creek’s potential to dilute the entirety of Suffolk Downs’s permitted undiverted flows, one must use comparable, “stormy” conditions on Sales Creek.

## **Response 2.6**

While EPA’s Fact Sheet contained a summary analysis of the NPDES permitting concept of “available dilution” of Sales Creek, the fact is that dilution factors are only relevant to a calculation of water-quality based effluent limits (as opposed to technology-based limits) that may be required to be included in an NPDES permit. Because Suffolk’s Final Permit does not contain any numeric water quality-based effluent limits<sup>17</sup> calculated by EPA using a dilution factor, the concept of establishing NPDES permit limits that take into account a receiving water’s “available dilution,” is not at all relevant to Suffolk’s permit. The Fact Sheet contained a discussion of the “available dilution” of Sales Creek because it is an analysis that routinely is performed when draft permits are developed. In any event, EPA also responds below to Suffolk’s specific points contained in Comment 2.6.

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<sup>17</sup> The Final Permit does include one numeric effluent limit, a limit for pH that reflects the numeric values for pH contained in the Massachusetts water quality standards; however, the basis for that permit condition is MassDEP’s CWA section 401 water quality certification. The pH limit was not separately “calculated” or otherwise imposed by EPA’s permit writers:

Suffolk's first specific point in this comment is that EPA misstates the standard at 314 CMR 4.03(3)(a). EPA disagrees that the Fact Sheet "misstates" the applicable Massachusetts water quality standard pertaining to hydrological conditions under which water quality criteria must be applied. In fact, although EPA's sentence constitutes a slight paraphrase of the literal sentence used in the standard, it is, in essence, equivalent for all intents and purposes. The Fact Sheet states that "State water quality standards establish the hydrological conditions at which water quality criteria must be applied. For rivers and streams the hydrologic condition is the lowest observed mean river flow for seven consecutive days recorded over a 10 year recurrence interval (7Q10) (314 CMR § 4.03(3))." See 314 CMR 4.03(3), "Hydrologic Conditions. The Department will determine the most severe hydrologic condition at which water quality criteria must be applied."

Notwithstanding EPA's statement in the first paragraph of this response to Comment 2.6., to further address Suffolk's specific comments about the Fact Sheet's description of "available dilution" of the receiving waters, EPA notes that an NPDES permit writer is required to consider a number of factors, including the dilution of the effluent in the receiving water, where appropriate. (See 40 CFR Section 122.44(d)(ii) and US EPA NPDES Permit Writer Manual, EPA-833-B-96-003, December 1996, p. 101). EPA agrees that this citation was not included in the Fact Sheet, but does not believe that any legal or technical implications flow from such omission. Further, contrary to Suffolk's assertion about the non-continuous nature of the permitted facility's process wastewater flows, the Final Permit recognizes (as did the Draft Permit) that Suffolk's discharges are not "continuous." For example, the permit's monitoring requirements relating to process waste water discharges only apply during "each discharge event" and/or during specifically defined wet weather conditions. EPA is not aware of any permit terms or conditions in the Final Permit that would only be consistent with a characterization of Suffolk's process waste water discharges as "continuous" (as opposed to non-continuous), and EPA notes that Suffolk's comment does not identify any specific permit terms and conditions that Suffolk believes should be changed as a result of the position Suffolk articulates in this comment.

Suffolk also commented on the Fact Sheet's use of a particular numeric value in relation to the permitted facility's Production Area's monthly flow data (260,700 cubic feet per month) presented on Page 20. EPA notes that this flow value was taken from Page 5, Section 3.3.2.2., of Suffolk's December 30, 2009 Nutrient and Stormwater Management Plan, which was submitted to EPA in response to EPA's November 17, 2009 Notice of Deficiency of NPDES Permit Application No. MA0040282. That Plan pre-dated Suffolk's selection and implementation of the final engineering and construction design for the improvements at the facility, including the process wastewater storage pond. EPA also notes, however, that the Production Area's flow data was not used by EPA in establishing any limits proposed in the Draft Permit or included in the Final Permit. EPA agrees that Suffolk's most recent Nutrient and Stormwater Management Plan, dated August 2012, contains the flow data referenced in Suffolk's comment, and EPA notes Suffolk's assertion that the flow from the Production Area, following the 2011-2012 construction at the permitted facility, is 245,200 cubic feet per month and that the Production Area flow from rooftops of buildings in the Production Area is 98,200 cubic feet per month.

EPA addresses the issue of subsurface infiltration discharges in its response to Comment 3.3, below.

**Comment 2.7. The Fact Sheet Erroneously Characterizes Suffolk Downs's Ability to Seek Approval of Land Application of Process Wastewater**

Two sections of the Fact Sheet (see pages 4 and 40) erroneously suggest that Suffolk Downs has decided not to apply wastewater or manure to any portions of its property. Suffolk Downs has made no such decision. In fact, ¶ 14(d) of the Consent Decree and § 4.2 of the NSMP contemplate that, provided that it proceeds in accordance with all applicable regulatory requirements, Suffolk Downs may investigate and apply for permission to use its process water to irrigate the track's grassy infield. Page 28 of the Fact Sheet appears to contemplate that option. The Agencies should remove any contrary statements from the Fact Sheet.

**Response 2.7.**

EPA clarifies here that the statements on page 4 and 40 of the Fact Sheet to which Suffolk points were not intended to mean that Suffolk may never apply process waste water or manure to any portions of its property. Those Fact Sheet statements, and any other statements in the Fact Sheet relating to land application of process waste water and manure, were intended by EPA to be consistent with Suffolk's comment, i.e., that Suffolk may, in the future, conduct such land application provided Suffolk proceeds in accordance with all applicable procedural and substantive regulatory requirements contained within EPA's CAFO regulations.

By way of background explanation, EPA notes that Suffolk's 2008 NPDES CAFO permit application states that Suffolk does not currently land apply manure, litter or process wastewater; rather, manure and bedding material is trucked off site to a composting facility. Further, Suffolk's August 2012 Nutrient and Stormwater Management Plan (NSMP) does not contain the site-specific protocols for land application of manure, litter or process wastewater required by 40 CFR §§122.42(e)(1)(viii) and (5). Therefore, the Final Permit does not authorize the land application of manure, litter or process wastewater. Suffolk's NSMP does state that Suffolk may, in the future, land apply process wastewater. Should Suffolk decide, in the future, to land apply manure, litter or process wastewater, Suffolk is required to submit to EPA for review and approval an amended nutrient management plan that complies with the NPDES CAFO regulations applicable to land application of process waste water and manure. If on-site land application is authorized, EPA would modify or re-issue Suffolk's Final Permit accordingly. EPA believes that the intent of the Fact Sheet is accurate as written, and neither the Fact Sheet nor Final Permit terms are inconsistent with Suffolk's current or potential future practices. The Fact Sheet and Final Permit are written to indicate that Suffolk is not now authorized under the permit to land apply process waste water, etc., not that Suffolk may never do so. Suffolk may apply to do so in the future if the proper regulatory procedures contained in EPA's applicable CAFO regulations are followed, including those that apply to nutrient management plans.

**Comment 2.8. The Fact Sheet Does Not Describe Post-Construction Grades Correctly**



Page 11 of the Fact Sheet states that the “perimeter of the Production Area is graded and/or bermed to prevent process wastewater from exiting the Production Area and to keep non-Production Area stormwater from flowing into the Production Area.” This statement is incorrect. EPA’s regulations at 40 CFR 122.42.(e)(1)(iii) require CAFO permits to “[e]nsure that clean water is diverted, as appropriate, from the production area.” (Emphasis added.) The current grading and berms around the Production Area substantially separate the Production Area from the Non-Production Area, and substantially prevent flows from travelling from one area to the other. See Deshais Affidavit. The Draft Permit similarly should require diversion measures “as appropriate.”

### **Response 2.8.**

It is somewhat unclear to EPA what Suffolk’s comment is intended to mean. EPA is interpreting the comment to mean that Suffolk is concerned about the language of the Draft Permit because while the current grading and berms around the Production Area “substantially separate” the Production Area from the Non-Production Area and they “substantially prevent” flows from travelling from one area to another, the language of the Draft Permit suggests that the separation of the two areas and their respective flows is absolute as opposed to “substantial.” However, in this comment Suffolk only refers to the EPA regulations that require CAFO permits to “[e]nsure that clean water is diverted, as appropriate, from the production area.” In fact, Part I.B.1.(b)(7) (i) of the Draft (and Final) Permit, entitled “Clean Water Diversion System,” includes that very requirement, which EPA has determined is “appropriate.” Beyond that permit requirement, Suffolk has not identified in this comment any other permit terms or conditions that Suffolk believes are objectionable.

Moreover, the description at Page 11 of the Fact Sheet is specific to already existing berms and grading at Suffolk’s Production Area, and EPA took that very description from Section 4.1 of Suffolk’s August 2012 Nutrient and Stormwater Management Plan. It is important to note that EPA’s regulations require implementation of “a nutrient management plan that, *at a minimum*, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412.” (emphasis added). In addition, EPA’s regulations at 40 C.F.R. § 122.42(e)(5) require that “[a]ny permit issued to a CAFO must require compliance with the terms of the CAFO’s site-specific nutrient management plan.” As noted above, the language that is the subject of Suffolk’s comment is part of Suffolk’s site-specific management plan. Consequently, Suffolk itself apparently deemed the best management practices in question to be “appropriate,” because Suffolk include them in its nutrient management plan, which is required under EPA’s CAFO regulations to be submitted to the permitting authority for review and approval before an NPDES permit is issued. See 40 C.F.R. § 122.42(e)(5).

### **Comment 2.9. The Fact Sheet Should Use As-Built Data for the Storage Pond**

Page 11 of the Fact Sheet reports that the total capacity of the Storage Pond is 2,296,520 gallons, with a total capacity of 307,000 cubic feet. As built, the Storage Pond holds approximately 2,176,800 gallons, with a total capacity of approximately 291,000 cubic feet. See Appendix,

Exhibit 4. As built, the Storage Pond is capable of retaining the expected runoff from a 50-year, 24-hour rain event within the Production Area. See id.

**Response 2.9.**

EPA responds to Suffolk's comment below, but also notes that the comment is not related to any specific or general term or condition of the permit.

The storage pond capacity data referenced on Page 11 of EPA's Fact Sheet was taken from and/or based on the data on Page 6 of Suffolk's August 2012 Nutrient and Stormwater Management Plan. EPA notes the correct storage pond capacity as stated in Suffolk's comment.

**3. Comments on the Draft Permit**

**Comment 3.1. The Permit Should Allow Discharges to Sales Creek "and Adjacent Wetlands"**

As discussed in Comments 2.3.3 and 2.3.6 above, Outfalls 003 and 006 do not discharge to Sales Creek. Instead, as Table 1 of the Fact Sheet notes, Outfall 003 discharges into a "flow-through pit" in "the wetlands adjacent to Sales Creek." Outfall 006 discharges to a stream and wetlands that lead to Sales Creek. The Permit should reflect those facts.

**Response 3.1.**

Page 1, Part I.A.2. . of the Final Permit clarifies that the permittee is authorized to discharge to an un-named stream and wetlands adjacent to Sales Creek.

**Comment 3.2. The Permit Should Allow Discharges From the Storage Pond In Accordance With the NELG**

Pages 25-27 of the Fact Sheet recognize that Suffolk Downs has designed the Storage Pond in compliance with the NELG, and that overflow conditions are likely to comply with the WQS as well. As such, the NELG permits Suffolk Downs to discharge overflow from the Storage Pond as a result of either "chronic or catastrophic" events. Part I.A.11.b of the Draft Permit nevertheless states that there shall be "no discharge from Suffolk's CAFO of rainfall runoff from manure or litter or feed storage piles, dumpsters, or other storage devices into the waters of the United States." The end of this sentence should be amended to include the words "except from Outfalls 001 and 002," the Storage Pond's authorized overflow points.

**Response 3.2.**

The clarifying language "other than as allowed at Part I.A. 1.a." has been added to Part I.A.12.b. of the Final Permit.

**Comment 3.3. The Permit Should Allow Dry-Weather Discharges From Outfalls 003 and 006**

Suffolk commented that the Final Permit should allow dry-weather discharges from Outfalls 003 and 006. Specifically, *Part I.A.11.g states: "This permit does not authorize discharges of pollutants from the Production Area of Suffolk's CAFO to surface waters during dry weather conditions and such dry weather discharges are prohibited."* For the reasons discussed in Comments 2.3.3 and 2.3.6 above, Outfalls 003 and 006 are likely to discharge groundwater (but not process wastewater) during dry weather. These Outfalls also receive contributions from sources outside of Suffolk Downs. For these reasons, Part I.A.11.g should be omitted.

### **Response 3.3.**

This response addresses the various comments Suffolk has made regarding flows from subsurface infiltration that comingle with flows discharged through Outfalls 003 through 011. These subsurface infiltration discharges are also referred to in this RTC document as "dry weather" flows.

At the time the Draft Permit was released, EPA Region 1 permitting staff were unaware of the contribution of flows from subsurface infiltration to the discharges at Outfalls 003 through 011 that Suffolk now asserts exists. That is why the Draft Permit did not address subsurface infiltration discharge(s), and why EPA believed that a permit condition that prohibited all dry-weather discharges was appropriate and consistent with EPA's applicable regulations. Now that Suffolk has provided information to EPA about the fact that subsurface flows infiltrate the systems that eventually discharge through Outfalls 003-006 and Outfalls 008-011, discharges from these outfalls are authorized during dry weather conditions in the Final Permit.

Suffolk has stated that the discharges associated with Outfalls 003 and 011 contain groundwater; however, for Outfalls 003, 005, 006, 006A, 008, 009, 010 Suffolk uses terms to describe the possibility of groundwater contribution such as "reasonably likely" or "appears" or "likely" In addition, according to the information Suffolk has now provided to EPA Region 1, Outfalls 003 and 006 discharge subsurface infiltration, some of which may originate offsite. Suffolk has indicated that the City of Revere's Municipal Separate Storm Sewer System (MS4) discharge upgradient of Suffolk Downs is comingling with one or more of Suffolk's discharges and probably discharges more or less continuously. Based on the information Suffolk has provided to EPA Region 1 to date, it appears that Suffolk has not fully investigated all of the possible sources of subsurface infiltration and comingled flows from off-site sources.

Given the specific operations and practices at Suffolk Downs, and the fact that it exists in an urban environment, EPA has determined that the dry weather monitoring requirements in Part I.A.3. of the Final Permit should be more comprehensive than what was originally proposed in the Draft Permit and designed to reveal the existence and concentration of the following parameters in the flows discharged into the receiving waters, some of which may contain subsurface infiltration (based on historic uses of the property, EPA does not expect chlorinated solvents or herbicides/pesticide/insecticides to be present to any great extent and, therefore, has not selected any indicator pollutants from these categories.) In deciding which parameters should be monitored, EPA relied upon the requirements established in EPA's Remediation General Permit (see [http://www.epa.gov/region1/npdes/remediation/RGP2010\\_FinalPermit.pdf](http://www.epa.gov/region1/npdes/remediation/RGP2010_FinalPermit.pdf)).

Part I.A.3. of the Final Permit requires sampling for the following parameters under dry weather conditions:

A. Parameters: Urban Fill + CAFO

Flow

Total Suspended Solids (TSS)

pH

Fecal coliform bacteria

E. coli

Enterococci

Nutrients:

Nitrate/Nitrite\*

Total Phosphorus\*\*\*

Solids:

Total Suspended Solids (TSS)\*

Pathogens:

Fecal coliform, E. Coli\*\*\*

Total Petroleum Hydrocarbons (TPH)\*

Inorganics:

Cyanide (Total CN)\*

Antimony, Arsenic, Cadmium, Chromium, Copper, Lead, Mercury, Nickel, Selenium, Silver,

Zinc, Iron\*

Aluminum\*\*\*

Volatiles:

Total BTEX\*

Total Group I PAHs\*

Total Group II PAHs\*

Ammonia/Ammonium\*\*\*

Total PCBs\*

Residuals:

Ethylene Dibromide (EDB)\*

DDD, DDE, DDT\*\*

Total Phenol\*

Total Phthalates\*

Chemistry

pH\*\*\*

\*Derived from 2010 Remediation General Permit, Category III, Subcategory A, General Urban Fill Sites, some of which appear on the Priority Pollutant List  
(see [http://www.epa.gov/region1/npdes/remediation/RGP2010\\_FinalPermit.pdf](http://www.epa.gov/region1/npdes/remediation/RGP2010_FinalPermit.pdf))

\*\*Derived from the Priority Pollutant List

\*\*\*Derived from parameters addressed in Suffolk's Draft Permit for reasons other than subsurface infiltration.

The Final Permit requires Suffolk to implement this monitoring program over the course of the first three years that the permit is in effect. EPA has determined that three years is an appropriate amount of time to allow for the generation of data collected at a frequency of once per month that will provide sufficient information from which the constituents of the effluent discharged from outfalls 003 and 006 during dry weather conditions may be properly characterized (see *Technical Support Document for Water Quality Based Toxics Control* (USEPA 1991 [EPA/505/2-90-001]). Three years is also an appropriate time period for calculating a long term average in accordance with the *Interim Guidance for Performance-Based Reduction of NPDES Permit Monitoring Frequencies* (USEPA 1996 [EPA 833-B-96-001]). EPA will then use that information to determine whether additional effluent limits or other permit conditions are warranted, and, if necessary, modify or re-issue the permit accordingly.

The Final Permit also includes a requirement for the permittee to submit a proposed monitoring plan for evaluating the extent of its contributions to outfalls 003 and 006 prior to these flows comingling with off-site and/or unregulated flows. The monitoring plan shall include, at a minimum, specific monitoring locations, parameters, and frequency of monitoring.

### **Comment 3.4. The Permit Should Not Require Water-Quality Testing of Outfalls 001 and 002**

The CWA regulations do not require testing for testing's sake. Instead, monitoring and testing is only a means of "provid[ing] for and assur[ing] compliance with all applicable requirements of the CWA and regulations." 40 C.F.R. § 122.43(a); see also *id.* at § 122.44(i)(1) (requiring, when applicable, monitoring requirements "[t]o assure compliance with permit limitations"). Unless otherwise set forth in the CWA or its regulations, monitoring conditions are to be established "as required on a case-by-case basis." *Id.* The rationale for any sampling or monitoring condition must be set forth fully in the record. See, for example, *In re Beckman Prod. Servs.*, 8 E.A.D. 302, 311 (E.A.B. 1999) (remanding regional decision because it insufficiently explained its rationale for required testing).

The Fact Sheet acknowledges (see page 9) that the Storage Pond is designed to hold the process wastewater generated within the Production Area "from all storm events smaller than the 50-year, 24-hour[] rainfall event, which significantly exceeds the 25-year, 24-hour rainfall event required by the Large Horse CAFO NELG." The Fact Sheet further states that Outfalls 001 and 002 are likely to carry discharges from the Storage Pond to "existing drainage swales" (and from there into Sales Creek) only during "extreme rainfall events exceeding the capacity of the [S]torage [P]ond."

By definition, there is no reasonable potential for Outfalls 001 and 002 to discharge pollutants to Sales Creek. The Permit should not require Suffolk Downs to sample those outfalls. Should the Permit require testing of the discharges from Outfalls 001 and 002 (in the unlikely event that there should be a discharge), the Permit should require sampling at only one of the two locations (see Comment 3.5.1 below), and only then at the top of the overflow structures, before they commingle with other runoff in the drainage swales to which these outfalls discharge.

The Permit also should not require testing of oil and grease from Outfalls 001 and 002 (Part I.A.1.b, table). The only oil and grease testing that the Draft Permit recommends is for Outfalls 001 and 002. Such testing is unnecessary, as there is no reasonable potential for discharge of oil and grease from Outfalls 001 and 002. See Deshais Affidavit. The NSMP restricts the use of vehicles in the Production Area. Those restrictions have succeeded in preventing oil and grease from ending up in Suffolk Downs's process wastewater. Since the summer of 2012, Suffolk Downs has been discharging to the Boston Water and Sewer Commission's sewer system, which in turn discharges to the MWRA system, process wastewater collected in the Storage Pond. Suffolk Downs has tested those discharges monthly. Each sample has had no detectable amounts of oil and grease. See *id.* The Permit should excuse Suffolk Downs from any further oil and grease sampling.

#### **Response 3.4.**

Suffolk comments that “[b]y definition, there is no reasonable potential for Outfalls 001 and 002 to discharge pollutants to Sales Creek. The Permit should not require Suffolk Downs to sample those outfalls.” EPA responds that the Final Permit only requires sampling at Outfalls 001 and 002 *if and when* a discharge of process waste water occurs as a result of an overflow from the retention's structure. As stated in the Fact Sheet, whenever extreme weather conditions would cause an overflow of process wastewater from the Production Area wastewater storage pond, the overflow would be discharged to Sales Creek via Outfalls 001 and 002. This is the only process wastewater discharge authorized by Part I.A.1.a of the Final Permit. Although Suffolk constructed its process wastewater storage pond and collection system to exceed the volume of stormwater runoff containment that is required by the NELG, in those cases where an extreme weather event does happen to cause an overflow of pollutants from the wastewater storage pond to Sale Creek, the Final Permit (consistent with the Draft Permit) requires Suffolk to sample the Outfalls 001 and 002 for each discharge event. Part I.A.1.b, Footnote 1 of the Final Permit states, in part, that “(s)amples taken in compliance with the monitoring requirements specified above shall be taken at a point representative of the discharge through the outfall, prior to mixing with the receiving water.” Consistent with Suffolk's comment, therefore, EPA has determined that sampling at the weir is acceptable.

A summary of the oil and grease sampling results referenced in Suffolk's comment and included with their comments as Exhibit 9.1, is presented below.

MWRA Sewer Use Discharge Permit, Part A, Sampling, reporting and other requirements, Sampling location 0101. Samples of wastewater from the animal feeding and handling areas shall be collected from the 2-inch PVC riser on the top slab of the pump station wet well, prior to mixing with any other streams.

Sample Date	Constituent	Result
8/24/12	O&G	ND
9/19/12	O&G	ND
12/17/12	O&G	ND
1/28/13	O&G	ND
2/22/13	O&G	ND
3/27/13	O&G	ND
4/29/1	O&G	ND

As stated on Page 33 of the Fact Sheet, Massachusetts has a narrative water quality standard for both Class SA and B water bodies that states, in part, that these water bodies shall be free from oil, grease and petrochemicals.

According to Massachusetts Water Quality Standards (314 CMR 4.05(4)(a)(7) and (3.)(b)(7)), Class SA water bodies shall be free from oil, grease and petrochemicals and Class B water bodies shall be free from oil, grease and petrochemicals that produce a visible film on the surface of the water, impart an oily taste to the water or an oily or other undesirable taste to the edible portion of aquatic life, coat the banks or bottom of the water course, or are deleterious or become toxic to aquatic life. A concentration of oil and grease of 15 mg/L is recognized as the level at which many oils produce a visible sheen.

EPA has reviewed the sampling analysis results from seven monthly sampling events that Suffolk submitted to the MWRA for discharges from Sampling location 0101, collected from the 2-inch PVC riser on the top slab of the pump station wet well, prior to mixing with any other streams, and has determined there is no reasonable potential for the discharge to cause or contribute to an excursion above the applicable water quality standards. Therefore, the Final Permit does not require a monitoring requirement for oil and grease.

### **Comment 3.5. The Permit Should Not Require Duplicative Sampling**

Section § 122.48(b) of the CWA regulations provides that the purpose of monitoring is “to yield data which are representative of the monitored activity.” Part IV.C.2.a of the Fact Sheet reports that the Agencies reviewed the MSGP to determine appropriate technology-based limits for the draft permit. The MSGP recognizes (consistent with § 122.48(b)) that in certain cases, monitoring of a single outfall may be sufficient to provide a representative sample of a facility’s industrial discharges. Section 6.1.1 of the MSGP provides that if the facility has two or more “substantially identical” outfalls, the permitting agency may allow the permittee to monitor the effluent of just one outfall, and report those results for substantially identical outfalls. A “substantially identical” outfall under § 6.1.1 is one that the permittee believes “discharge[s] substantially identical effluents based on the similarities of the general industrial activities and control measures, exposed materials that may significantly contribute pollutants to stormwater and runoff coefficients of their drainage areas.”

The Draft Permit requires sampling at all eleven outfalls identified in the Draft Permit. Several are “substantially identical,” or receive “substantially identical” discharges.

### **Response 3.5.**

EPA's responses to Comments 3.5.1 through 3.5.3., below, include a response to the general comment Suffolk articulates in Comment 3.5, above.

#### **Comment 3.5.1 Outfalls 001 and 002 are Substantially Identical**

While Suffolk Downs has requested that it be excused from sampling Outfalls 001 and 002 (see Comment 3.4 above), page 9 of the Fact Sheet acknowledges that both Outfalls would (in extreme 50-year rain events) discharge the same process wastewater from the Storage Pond. Thus, one outfall is "substantially identical" to the other. It is not necessary to sample both locations in order to obtain a representative sample of any effluent being discharged. Should the Agencies require Suffolk Downs to monitor Outfalls 001 and 002, the Agencies should limit any sampling to Outfall 001, at the location identified in Comment 3.4.

#### **Response 3.5.1.**

EPA agrees that the discharge from Outfalls 001 and 002 should be substantially identical. Therefore, footnote 1 at Part I.A.1.b. of the Final Permit reflects a change from the proposed requirements, such that if both Outfall 001 and 002 are discharging during the event, sampling is required to be conducted only at Outfall 001; however, if during the discharge event only one outfall is discharging, sampling is required to be conducted at that outfall. Footnote 1 has been amended as follows:

"Samples taken in compliance with the monitoring requirements specified above shall be taken at a point representative of the discharge through the outfall, prior to mixing with the receiving water (top of overflow structure(s)). All samples shall be tested in accordance with the procedures in 40 C.F.R. Part 136, unless specified elsewhere in the permit. In the event that both of Outfalls 001 and 002 are discharging at the same time, the permittee may use the sampling results for Outfall 001 to satisfy the sampling requirements for Outfall 002. Flow must be estimated for both outfalls (independently of the other) when they are both discharging."

#### **Comment 3.5.2. Roof Runoff Contributed to Outfalls 003 and 006 Is Substantially Identical to the Discharges from Outfall 005.**

Following Suffolk's 2011-2012 construction program, dedicated drains that solely collect roof runoff from the Production Area discharge through three outfalls, Outfalls 003, 005 and 006. See Deshais Affidavit. Roof runoff discharged through Outfall 003 commingles with groundwater and apparent offsite sources from the Washburn Avenue-area outside of Suffolk Downs. Roof runoff discharged through Outfall 006 commingles with groundwater, discharges from the northern drive-aisle's BMPs, and drainage from Revere Beach Parkway/Winthrop Avenue (again, outside of Suffolk Downs). By contrast, a new drain system that includes only roof runoff and groundwater from the Production Area, water that has never been in contact with horses, discharges through Outfall 005. Since the discharge of Outfall 005 is substantially identical to the roof runoff contributed to Outfalls 003 and 006, the Permit should not require



Suffolk Downs to sample roof runoff from any location other than the end of the pipe at Outfall 005.<sup>18</sup>

### **Response 3.5.2**

EPA requires that samples be obtained from locations that are representative of the discharge. As described in the above comment, flow that is discharged through outfalls 003 and 006 contain subsurface infiltration that has comingled with flows from different off-site sources (from the Washburn Avenue area and from the Revere Beach Parkway/Winthrop area, respectively). Therefore, these discharges may not be “substantially identical”. Therefore, the Final Permit specifies that Suffolk must provide samples that are “representative of the discharge.”

Specifically, the Final Permit requires independent sampling of outfalls 003, 005, 006 and 006A.

As noted in previous comments, Suffolk’s assertions that water in the new drain system has never been in contact with horses is incomplete in addressing why these discharges are not process wastewater. However, EPA notes that the Agency has no reason to believe that manure, litter, or process wastewater, or other materials, such as bedding and feed, are commingled with these flow.

### **Comment 3.5.3 Outfalls 008, 009, 010 and 011 are Substantially Identical.**

Outfalls 008, 009 and 010 are located in drainage swales at the outlets of three BMPs located in the infield of Suffolk Downs’s track. They each receive, or have the potential to receive, the same effluents: discharges from the sand filter underdrain, sand filter overflow, and track runoff that overflows the weir of the sand filter diversion structure. Outfalls 009 and 010 also receive discharge from the storage pond underdrains that contain the same effluents. The watersheds for these outfalls have the same runoff characteristics, and Suffolk Downs has designed each to treat proportional amounts of runoff from the track. See id.

Outfall 011 is different from Outfall 008 only to the extent it does not lead to a drainage swale and is different from Outfall 009 and 010 to extent it does not discharge to a drainage swale or receive discharges from the Storage Pond underdrains. The BMP underdrain that discharges through Outfall 011 functions the same as the other sand-filter underdrains. Outfall 011 should thus discharge substantially identical effluent as Outfalls 008, 009 and 010. The Permit thus should allow Suffolk Downs to sample only one of these four outfalls, preferably Outfall 011.

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<sup>18</sup> [Footnote 13 to Suffolk Downs’ Comment 3.5.2] Should the Permit require sampling at Outfalls 003 and 006, Outfall 003 should be tested at one of the downspouts that contribute to Outfall 003, and Outfall 006 should be sampled at DMH-8. Each proposed location samples authorized discharges before they mix with other discharge streams. See Deshais Affidavit; see also MSGP, Part 6.1.2.

### **Response 3.5.3**

EPA agrees with Suffolk's belief that the wet-weather discharge from Outfalls 008, 009, 010, and 011 are substantially identical. Therefore, Part I.A.2.b. of the Final Permit has been changed from what was proposed to require reporting of monitoring results from Outfall 011 only.

As indicated in the comment, however, the outfalls are not identical in their potential for dry weather discharges. See EPA's response to comment 3.3 for dry weather monitoring.

### **Comment 3.6. The Permit Should Allow Suffolk Downs to Monitor and Test Its Contributions to Outfalls 003 and 006 Before Those Contributions Commingle With Off-site or Unregulated Flows.**

Section 6.1.2 of the MSGP provides that "where discharges authorized under the permit comingle with discharges not authorized under the permit, sampling of the authorized discharges must be performed at a point before they mix with other waste streams, to the extent practicable."

As described in Comments 2.3.3 and 2.3.6, offsite waste streams contribute to the flows at Outfalls 003 and 006. Moreover, as the Table 1 of the Fact Sheet notes, Outfall 003 discharges at a "flow-through pit[] located in the wetlands.." The end of the pipe is buried beneath that pit. Discharges from the pit diffuse through heavy vegetation.<sup>19</sup> See Deshais Affidavit. The pit also collects stormwater runoff present in the wetlands and adjacent uplands. See *id.* The discharge point for Outfall 006 similarly is partially submerged, and receives surface runoff from adjacent uplands. It thus is impossible at the locations identified in the Draft Permit as Outfalls 003 and 006<sup>20</sup> to distinguish permitted discharges from Suffolk Downs from offsite flows. See *id.*

Some of the offsite discharges may be separately regulated under the Small MS4 General Permit applicable to the MassDCR (which is responsible for operation and maintenance of Revere Beach Parkway and portions of Winthrop Avenue) and the City of Revere. In a Notice of Intent dated June 2, 2003, the City of Revere stated that it operated seven outfalls to Sales Creek. See City of Revere, NPDES Stormwater Permit Notice of Intent for Discharges from MS4s (June 2, 2003) (Appendix, Exhibit 11). Suffolk Downs has not yet identified the outfalls described in the NOI.<sup>21</sup> The uncertain regulatory status of the off-site contributors to the discharges at Outfalls

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<sup>19</sup> [Footnote 14 to Suffolk Downs' Comment 3.6] The elevations of the drain line and the flow-through pit at Outfall 003 (which is approximately three feet deep) cause the drain pipe to surcharge. See Deshais Affidavit. Discharge occurs at Outfall 003 as hydraulic head builds in the drain line and effluent percolates through the soil. See *id.*

<sup>20</sup>[Footnote 15 to Suffolk Downs' Comment 3.6] See Part I.A.1.b, table footnotes 1 & 4; Part I.A.2.a., table footnotes 1 & 5; Part I.A.3, table footnotes 1 & 3. While Suffolk Downs believes that sampling from Outfall 005 should suffice for sampling at Outfalls 003 and 006, see Comment 3.5.2, should the Agencies require sampling at Outfalls 003 and 006, the Permit should use the locations recommended in note 13 above.

<sup>21</sup> [Footnote 16 to Suffolk Downs' Comment 3.6] Suffolk's potential lack of control over offsite contributors to Outfalls 003 and 006 makes it difficult, if not impossible, for Suffolk to assure compliance with conditions such as those found in Parts I.A.4, 5, 6, and 7, which address effluent characteristics, as opposed to conditions such as those found in Parts I.A.9, 10, and 11, which regulate Suffolk Downs's conduct.

003 and 006, coupled with the certainty that such flows do not consist of process wastewater, further counsels against requiring monitoring and testing at Outfalls 003 and 006 as identified in the Draft Permit.

### **Response 3.6.**

EPA disagrees with Suffolk's comment insofar as the applicability of the sampling provisions of the MSGP are concerned, because the MSGP applies limitations for stormwater only, and any other discharge is otherwise permitted. In this instance, Suffolk's outfalls are discharging both stormwater and otherwise unpermitted subsurface infiltration. Therefore, it is reasonable in this instance to require end-of-pipe monitoring for all discharges from Suffolk's outfalls.

EPA agrees, however, with Suffolk's request to monitor and test its contributions to Outfalls 003 and 006 before these flows co-mingling with off-site and/or unregulated flows. Therefore, the Final Permit requires Suffolk to submit a proposed monitoring plan within 6 months of the effective date of the permit. The monitoring plan should include specific monitoring locations, parameters, and frequency of monitoring.

### **Comment 3.7. The Permit Should Modify its Definition of "Dry Weather"**

Part I.A.3 of the Draft Permit requires monitoring of all outfalls during "dry weather." Footnote 2 of the table on Page 7 of the Draft Permit defines "dry weather" as "any time when there is no precipitation and no snow melt, and is at least 24 hours after the end of a rainfall event that was greater than 0.1 inches in magnitude." This definition of "dry weather" contradicts the Draft Permit's definition of "wet weather," which consistently relies on a 72-hour gap from a greater than 0.1 inch rainfall event. See Part I.A.2.a, table footnote 2; Part I.A.2.b., table footnote 2. The NPDES permit that the Agencies issued to P.J. Keating Company in September 2007 (NPDES Permit No. MA0029297) for a Class B receiving water has the same 72-hour definition of "wet weather" as the Draft Permit, but defines "dry weather" as "a period of no less than 72 hours in which no measurable precipitation occurs." *Id.* at 4.<sup>22</sup> Given the persistent groundwater discharges at some of Suffolk Downs's outfalls, the Permit should use a 72-hour "dry weather" test, to correspond to the Draft Permit's 72-hour "wet weather" test.

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<sup>22</sup> Footnote 17 to Suffolk Downs' Comment 3.7] Most NPDES permits recently issued by the Agencies for discharges to Class B receiving waters do not define "dry weather." Of the four permits besides P.J. Keating Co. that do, two use a 48-hour no-precipitation rule for "dry weather," but those permits either do not have a corresponding "wet weather" definition. See Lowell Cogeneration Company LP, NPDES Permit No. MA0031071, page 5, footnote 1 (Dec. 2008); Texas Instruments, Inc., NPDES Permit No. MA0001791, pages 2-3, 5-6 (Oct. 2010). Another uses a 48-hour dry weather definition with a corresponding 48-hour wet-weather definition. See St. Gobain Abrasives, Inc., NPDES Permit No. MA0000817, page 7, footnote 1 (Sept. 2009). The permit issued to the Massachusetts Bay Transportation Authority, NPDES Permit No. MA0028941 (Apr. 2010) – which contains a 72-hour wet-weather definition, see *id.* at page 4, footnote 2 – uses a 48-hour dry-weather definition only for purposes of designating when the permittees are to conduct annual acute toxicity tests. See *id.* at page 5, footnote 8.

### **Response 3.7**

In response to Suffolk's comment, EPA has written into the Final Permit a modified definition of "dry weather" to include a 72-hour waiting period, harmonizing that definition with the time period contained in the definition of "wet weather." Therefore, a footnote has been added to the table in Part I.A.3. Final Permit includes the following definition of "dry weather": "Any period of time that meets both of the following two conditions: 1) there is no precipitation and no snow melt; and 2) the period of time is at least 72 hours after the end of a rainfall event that was greater than 0.1 inches in magnitude." This longer waiting period (i.e., 72 hours) will provide greater assurance that samples are representative of dry weather discharges (i.e., samples that do not contain rainwater or water arising from snowmelt).

### **Comment 3.8. Wet-Weather Waiting Times Should Include Snow Melt**

As the Draft Permit's definition of "dry weather" recognizes, snow melt at Suffolk Downs can generate runoff similar to a 0.1 inch rain event. The Draft Permit's "wet weather" definitions (see, for example, Part I.A.2.a. table footnote 2; Part I.A.2.b. table footnote 2) should include snow melt in tolling the 72-hour waiting period.

### **Response 3.8.**

EPA agrees to include snow melt in tolling the waiting period between rainfall events. Therefore, Part I.A.2.a. table footnote 2; Part I.A.2.b. table footnote 2 is edited as follow: "Wet weather conditions are defined as a rainfall event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (i.e., greater than 0.1 inch) rainfall or snow melt event. See also definition of "storm water" at 40 C.F.R. Section 122.26

### **Comment 3.9. The Permit Should Require Only Monthly Dry-Weather Sampling of Outfalls 003, 004 and 006, and Quarterly Sampling (With Phase-Out) of Outfalls 008, 009, 010, and 011.**

As noted in Comment 2.4 above, dry-weather discharges of groundwater – discharges having nothing to do with the Production Area or industrial activities within the Non-Production Area -- are likely to be seen at Outfalls 003, 004, 006, 008, 009, 010 and 011. Part I.A.3 proposes testing these outfalls for each discharge event. The only other recent NPDES permits for Class B receiving waters that specifically address dry-weather discharges of groundwater allow monthly testing. See Texas Instruments at 2, 5; St. Gobain Abrasives at 2-3. The Draft Permit and Fact Sheet offer no reason for requiring testing for every discharge event, other than the assertion that the NELG prohibits all dry-weather discharges. As explained in Comment 2.4, the NELG does not apply to discharges arising outside of the Production Area or runoff from the Production Area that never comes in contact with animals, manure, feed or bedding materials.

Monthly testing of Outfalls 003, 004 and 006 will adequately assure compliance with the Permit's requirements. See Deshais Affidavit. As for Outfalls 008, 009, 010 and 011, testing should be required only quarterly. Page 31 of the Fact Sheet asserts that the discharges from

these locations are similar to those of the sand- and gravel-mining industries, and suggests that the TSS benchmarks for that industry that are set forth in the MSGP are appropriate for Outfalls 008, 009, 010 and 011. Part 6.2 of the MSGP requires permittees to perform benchmark monitoring only on a quarterly basis. Part 6.2.1.2 of the MSGP further provides that (a) if the average of the first four samples does not exceed the benchmark, the permittee need not sample further; and (b) if the average exceeds the benchmark, sampling must continue until the permittee attains the benchmark limit. The Permit should apply to Outfalls 008, 009, 010 and 011 all applicable provisions of Part 6.2 of the MSGP.

### **Response 3.9**

The monitoring frequency for dry weather sampling has been changed from “each discharge event” to “monthly” in the final permit. This monitoring frequency applies to all of the outfalls. This is consistent with the monitoring frequency proposed in Suffolk’s comment for outfalls 003, 004, and 006. However, EPA has determined that it would not be appropriate to change the monitoring frequency “quarterly”, as proposed in the above comment, for Outfalls 008, 009, 010, and 011.

The Draft Permit was written prior to EPA’s understanding that dry weather flows consisting of subsurface infiltration. In order to properly characterize the dry weather discharge, EPA has determined that monthly monitoring is necessary and is therefore required by the Final Permit. However, after 3 years of data collection, the Permittee may request a reduction in that monitoring frequency. EPA will evaluate any such request based on the most current information at that time. See response 3.3.

EPA notes Suffolk’s comment concerning the applicability of the NELG. Insofar as the facts as known at this time are correct, Suffolk is correct. EPA would like to clarify, however, that should Suffolk engage in practices (such as animal confinement, manure storage, or feed storage) that would subject it to the requirements of the NELG outside the Production Area, as currently delineated, then any discharges from any such part of the facility would become subject to the requirements of the NELG.

### **Comment 3.10 Dry-Weather Sampling Parameters for Outfalls 008, 009, 010 and 011 Should Be Consistent With Wet-Weather Parameters.**

According to Part I.A.2.b of the Draft Permit, the pollutants of concern for Outfalls 008, 009, 010 and 011 – all of which lie outside of the Production Area -- are pH and TSS. By contrast, Part I.A.3 proposes to have Suffolk Downs sample Outfalls 008, 009, 010, and 011 in dry weather for not just pH and TSS, but also aluminum, fecal coliform, E. coli, total phosphorous and nitrogen-ammonia. Neither the Fact Sheet nor the Draft Permit explains why these Non-Production Area outfalls should be sampled in dry weather for parameters that the Draft Permit otherwise ignores.

### **Response 3.10**

As previously stated, the Draft Permit was issued prior to EPA understanding that the outfalls routinely discharge subsurface infiltration. In response to Suffolk's comments regarding groundwater infiltration, EPA has included in the Final Permit a subsurface infiltration monitoring program that will ensure that the subsurface infiltration flows being discharged are properly characterized. The revised monitoring program is discussed in EPA's response to Suffolk's Comment 3.3, above.

### **Comment 3.11. Sampling of Discharges Should Be Limited to Normal Business Hours**

Parts I.A.1.b and 2.a require sampling during "wet weather conditions," and further require that the permittee sample in accordance with 40 CFR Part 136. Table II of 40 CFR § 136.3 imposes a maximum 48-hour hold time for BOD5 samples and a six-hour hold time for bacteria. In light of these holding requirements, the Permit should limit sampling to normal weekday business hours. Suffolk Downs does not continuously staff its facility with personnel who can perform the required testing at all hours and ensure delivery to a certified laboratory. See Deshais Affidavit. Activities in the Production and Non-Production Areas largely occur during normal business hours. The Permit is unlikely to achieve a higher level of compliance by requiring wet-weather testing outside of normal weekday business hours. See *id.* Wet-weather testing thus should be limited to normal weekday business hours.

### **Response 3.11.**

EPA does not agree that it would be appropriate to limit sampling for Outfalls 001 and 002 to normal business hours as Suffolk requests. Outfalls 001 and 002 should discharge, if at all, only on rare instances, and those discharges certainly could occur outside of normal business hours; sampling should occur during these events for the purpose of determining the constituents of the discharge at the time those events occur.

EPA also does not agree that it would be appropriate to limit sampling to normal business hours for any other outfalls required by the Final Permit. Given the sampling requirements applicable to Outfalls 003 through 011, however, it should generally be possible for Suffolk to schedule its sampling during business hours when wet-weather conditions exist.

### **Comment 3.12. The Permit Should Not Require pH Testing.**

The Draft Permit requires pH testing from every outfall, and imposes discharge limits of 6.5 to 8.3. Such testing is unnecessary. The only sources of the discharges from each of the regulated outfalls are process wastewater (in extreme events), stormwater and groundwater. The latter sources do not result from any "industrial" process. See *id.* As for Suffolk Downs's process wastewater, Suffolk Downs's testing of its discharges to the MWRA show that the pH of those discharges ranges between 6.8 and 7.95, well within the proposed limits. See *id.* (Page 34 of the Fact Sheet notes that even before Suffolk's 2011-12 construction, Suffolk's discharges ranged between 6.5 and 7.8.) Additional pH testing will not achieve any greater permit

compliance. See Deshais Affidavit. The Permit should excuse Suffolk Downs from further pH testing.

**Response 3.12.**

EPA notes that the numeric pH limits and related monitoring requirements must be included in the Final Permit as a condition of the Commonwealth of Massachusetts' CWA section 401 certification.

As explained previously in this RTC document, the Final permit contains revisions to the proposed sampling requirements based on certain of Suffolk's comments (i.e., sampling is not required for each month at Outfalls 004, 005 and 007. Additionally, language has been added to the Final Permit stating that requests for a reduction(s) in monitoring frequencies will be considered following three years from the effective date of the permit).

**Comment 3.13. The Permit Should Allow Partial Closure of CAFO-Related Facilities**

Paragraph 91 of the Consent Decree permits Suffolk Downs, upon approval by EPA, to close portions of the Production Area and remove the closed portions from the Consent Decree's Production-Area restrictions. Parts I.A.11.e and I.A.13.b(1) of the Draft Permit prohibit, however, the "abandonment" of manure, litter or process-wastewater storage and handling structures, even if adequate storage and handling structures remain in those portions of the Production Area that remain open. The Permit should (a) replace the words "shall be abandoned at Suffolk's CAFO" in Part I.A.11.e with "in the Production Area shall be abandoned except in accordance with the terms of this Permit"; and (b) insert the words "except in accordance with the terms of this Permit" at the end of the first sentence of Part I.A.13.b(1).

**Response 3.13.**

In response to Suffolk's comment, the Final Permit includes the changes requested by Suffolk.

**Comment 3.14 The Permit Should Approve Minor Amendments to NSMP**

In light of its operational experience following its 2011-12 construction, Suffolk Downs proposes the following modifications to its NSMP. Suffolk Downs will be submitting these proposed amendments separately to EPA enforcement personnel pursuant to the terms of the Consent Decree. (In each bullet below, Suffolk Downs presents the Draft Permit's reference to the NSMP requirement, followed the reference in the NSMP to the same requirement.)

- Part I.B.1.b(2)(iii) (NSMP § 3.2(3)): The words "track-supplied" should be changed to "track-approved." "Track-approved" hoses work as well as "track- supplied" hoses.
- Part I.B.1.b(4)(c) (NSMP § 3.4.1, item 3): There are ten parking spaces next to an office trailer within the Production Area that serves as a medical clinic. Suffolk long has designated those parking spaces for disabled persons having properly licensed vehicles. Part I.B.4(c) proposes to allow only those vehicles associated with "veterinary services or track operations" to park within

the Production Area. Suffolk's 2011-2012 improvements greatly reduce the risk that such vehicles will pollute Sales Creek. Post-construction sampling bears this out. See Comment 3.4 above. The first sentence of Part I.B.4(c) thus should be revised as follows: "Except for those vehicles associated with veterinary services or track operations, emergency vehicles, or those vehicles authorized to park in designated disabled parking zones, vehicles may not be parked within the Production Area except during short-term deliveries."

- Part I.B.1.b(6)(i)(b)-(d) (NSMP § 7.1.1): The Draft Permit requires installation and observation of a "depth marker" in the Storage Pond. EPA's regulations at 40 CFR § 412.37(a)(1)(iii) require only a marker that identifies a storage pond's minimum capacity to contain the "required production area runoff." Suffolk Downs has installed a gauge on the Storage Pond's inlet-control structure that indicates the Storage Pond's depth. See Deshais Affidavit. That gauge permits Suffolk Downs to determine whether the Pond has the requisite minimum capacity. See *id.* The words "or other gauge" should be inserted in Part I.B.1.b(6) after when the words "depth marker" appear.

- Part I.B.1.b(7)(iii) and (iv) (NSMP § 7.2, second and third bullets): The NSMP currently calls for "weekly" inspections of the perimeter of the Production Area and all Production-Area gutters and downspouts during rain events in order to assure that all such features operated properly post-construction. Post-construction wet-weather inspections have confirmed that those features operate as designed. The only purpose of additional inspections is to identify maintenance needs. There is nothing in the CWA regulations that requires identification of such needs on a weekly basis. Inspections should be required only monthly.

- Part I.B.1.b(7)(iii) and (iv) (NSMP § 7.2, second and third bullets): The NSMP currently calls for inspections of the perimeter of the Production Area and all Production-Area gutters and downspouts during "dry weather." Dry-weather inspections serve no purpose: one needs rain in order to detect the need to maintain the perimeter, gutters and downspouts. Inspections should be required only during wet weather.

#### **Response 3.14.**

In response to Suffolk's requests, EPA has included the requested changes in the Final Permit.

#### **Comment 3.15. Other Minor Modifications to Draft Permit**

- In order to be consistent with the NSMP, the words "all water lines" in Part I.B.1.b.(2)(vi) of the Draft Permit should be replaced with "above ground water lines".

- For the reasons set forth in Comment 2.9 above, (a) the words "as appropriate" should be inserted after "isolated" in the first sentence of Part I.B.1.b.(7)(i) of the Draft Permit; and (b) the words "to determine whether inappropriate amounts of process wastewater are exiting the Production Area and whether inappropriate amounts of stormwater from outside the Production Area are entering the Production Area" should replace "to verify that process wastewater is not exiting the Production Area and stormwater originating from outside the Production Area is not entering the Production Area" in Part I.B.1.b.(7)(iii) of the Draft Permit.



•The words “above ground” should be inserted before “Production Area” in the first sentence of Part I.B.1.b(7)(v). As page 7 of the Fact Sheet notes, some of Suffolk Downs’s stormwater-diversion devices and facilities are underground, and cannot be easily inspected visually.

### **Response 3.15.**

In response to Suffolk’s individual comments in Comment 3.15., EPA has addressed the concerns raised by Suffolk in the first and third bullets above. However, EPA responds to the concern raised in Suffolk’s second bullet, as follows:

The description at Page 11 of the Fact Sheet is specific to already existing berms and grading at Suffolk’s Production Area, and EPA took that very description from Section 4.1 of Suffolk’s August 2012 Nutrient and Stormwater Management Plan. It is important to note that EPA’s regulations at 40 C.F.R. § 122.42(e)(1) require implementation of “a nutrient management plan that, *at a minimum*, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412.” (emphasis added). In addition, EPA’s regulations at 40 C.F.R. § 122.42(e)(5) require that “[a]ny permit issued to a CAFO must require compliance with the terms of the CAFO’s site-specific nutrient management plan.” As noted above, the language that is the subject of Suffolk’s comment is part of Suffolk’s site-specific management plan. Suffolk itself apparently deemed the best management practices in question to be “appropriate,” because Suffolk include them in its nutrient management plan, which is required under EPA’s CAFO regulations to be submitted to the permitting authority for review and approval before an NPDES permit is issued. See 40 C.F.R. § 122.42(e)(5). Consequently, the changes to the permit requested by Suffolk in the second bullet would not meet the requirements of the CAFO regulations, which require that the terms of the NMP be included in the permit, and would be inconsistent with Suffolk’s NMP.

