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February 22, 2011

United States Environmental Protection Agency – Region 1
Ms. Kate Renahan
Office of the Regional Administrator
5 Post Office Square – Suite 100
Mail Code: ORA01-1
Boston, Massachusetts, 02109-3912

Subject: Comments on the Draft Massachusetts Interstate, Merrimack, and South Coastal Small MS4 General Permit

Dear Ms. Renahan:

The Massachusetts Coalition for Water Resources Stewardship (“the Coalition”) is in receipt of the Draft Massachusetts Interstate, Merrimack, and South Coastal Small MS4 General Permit for stormwater management, applicable to over 150 communities in the Commonwealth. This letter provides our comments for consideration when developing the final permit.

The Coalition recognizes the importance of stormwater management to the environmental health of Massachusetts waterways and the maintenance of designated uses. With the Clean Water Act (CWA) long focusing on point sources alone, we applaud the efforts of the Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (MassDEP) over the last decade to incorporate non-point source pollutant reduction into the CWA regulatory program.

The regulatory agencies and the regulated communities share a common mission – to ensure the health and quality of our cities and towns and their natural resources. In order to accomplish these goals, communities must balance environmental programs with other needs and responsibilities they have and implement them in a fashion that is both feasible and financially responsible. In this context, the Coalition offers the following comments on the Draft Permit:

Municipal Stormwater Requirements under the Clean Water Act

- Section 2.1 (page 12) states that, “pursuant to Clean Water Act 402(p)(3)(B)(iii), this permit includes provisions to ensure that discharges from the permittee’s small MS4 do not cause or contribute to an exceedance of applicable water quality standards.” A check of this section of the Clean Water Act (CWA) reveals no mention of water quality standards or requirements for MS4 discharges to not cause or contribute to an exceedance of said standards. Rather, **the law** states that MS4’s must remove pollutants in stormwater to the maximum extent practicable (MEP), a term undefined in the CWA but which explicitly establishes that there are cost and reasonableness considerations to stormwater pollutant removal by municipalities.¹ In crafting the 1987 amendments to the CWA that established the MS4 program, Congress recognized that achieving water quality standards in something so variable and often times uncontrollable as municipal stormwater was so daunting and unlikely that a new standard, MEP, must be applied. EPA has effectively ignored this reality of the law in drafting a permit that requires compliance with water quality standards. It is not until section 2.4 on page 18 that MEP is raised as a permit condition. In this section MEP is properly described and the BMP approach to meeting MEP through an iterative process is appropriately offered. It is suggested that all language in the water quality section of the draft permit be stricken and the permit begin with the language from section 2.4. Per the CWA, MEP is the standard to which pollutants must be removed. Achieving MEP may not, and is unlikely to, achieve water quality standards in MS4 discharges. MEP does not equate to achieving Water Quality Standards as the cost and effort involved to meet the standards will rarely be feasible for a municipality. Achievement of water quality standards and requirements that MS4 discharges not cause or contribute to exceedances of WQS can only be set as goals in a stormwater permit if the permit is to be consistent with federal law.

- Section 2.2 is a continuation of the “achieve water quality standards” requirements of the draft general permit with a focus on impaired waters and TMDL waste load allocations (WLA). The TMDL WLA is effectively a numeric water quality standard that permittees are directed to achieve. For phosphorus, Section 2.2.1(d)(i) requires that “The permittee shall develop a written plan to assess the amount of phosphorus discharged from the MS4 to the waters identified in Appendix G, Table G-1 **and to reduce the phosphorus to levels consistent with the assumptions and requirements of the LAs and WLAs of the TMDL.**” Permittees are given 3 years to develop the written plan and 7 years to complete implementation. A check of Appendix G, Table G-1 reveals that phosphorus removal requirements of TMDLs can range up to 97% for some ponds! Table G-1 identifies specific numeric phosphorus reduction values for each town and each impaired water with values of 50%-97% not uncommon. These are numeric water quality requirements that go well beyond any interpretation of MEP. Requiring municipalities to achieve these phosphorus reduction levels is impracticable. The more appropriate permit language would be to the effect that the MS4 must remove phosphorus to the MEP from discharges to impaired waters with TMDLs for phosphorus.

¹ The Random House College Dictionary Revised Edition, 1988, defines practicable as “capable of being done, effected, or put into practice, with the available means; feasible”

Data Needs for Compliance by MS4 Communities

The Draft Permit requires an enormous quantity of data to be gathered in a very short timeframe in order to meet all of the permit requirements. The following is a list of data requirements included in the permit.

- The locations of all stormwater infrastructure including outfalls, pipes, catch basins, interconnections to other small MS4s, catchment delineations, treatment structures and other Best Management Practices (BMPs);
- Data regarding the water quality of receiving waters, including water quality classifications and standards, identified impairments, total maximum daily loads (TMDLs), and waste load allocations (WLAs);
- Additional detailed receiving water quality information to identify areas with a high illicit discharge potential, such as fecal coliform, ammonia-nitrogen, total phosphorus, and surfactant data, and “any other available sources of dry weather water quality data including state agencies or watershed associations”;
- Locations of drinking water supplies, shellfish beds, fishing areas and other sensitive environmental resources;
- Parcel-by-parcel land use information, including specific uses (car dealers, car washes, gas stations, garden centers, industrial manufacturing areas, colleges, and residential areas), building ages, septic system ages, results of Title 5 inspections, locations of swimming pools, and ages of industries;
- Sanitary sewer system information, including sewer ages, the location, date, volume, and mitigation of sanitary sewer overflows, and the locations of existing and former combined sewer overflows; and
- Additional optional information such as topography and orthophotography.

If a community does not already have a robust Geographic Information System (GIS), the development of these data layers would require years of work and will cost hundreds of thousands of dollars. The timeline for completion of much of the mapping in the Draft Permit and the data analyses that are contingent upon its completion is one to two years from the effective date. These are not achievable milestones for communities that do not already have access to this information. Data collection would require a flyover of the community and/or extensive global positioning system (GPS) field work. The allocation of funds followed by the procurement of the required services could consume the majority of the time allowed for these mapping and data analysis tasks. This could be exacerbated depending on the timing of the permit issuance within a community’s fiscal year. For a community that already has all of the required data, the data compilation and analyses could consume the entire time allowable for these tasks.

Timeline for Completion of Permit Milestones

Among the many requirements in the Draft Permit, the following milestones are included at the times indicated for communities that were subject to the 2003 permit:

120 days following EPA authorization:

- Submit the Stormwater Management Plan, including initial mapping, measurable goals for each BMP, milestones, timeframes, and measures of assessment.

Within 6 months of the effective date:

- Inventory all permittee-owned facilities within the categories listed;
- Develop a program to rehabilitate infrastructure at municipal facilities as needed;
- Begin sweeping all streets twice per year; and
- Begin quarterly inspections of all municipal facilities.

Within 1 year of the effective date:

- Submit a Stormwater Pollution Prevention Plan for all municipal facilities;
- Prepare written operations and maintenance procedures for municipal activities;
- Develop a procedure for site inspections and enforcement of construction site measures;
- Develop a protocol for the illicit discharge detection program and prioritize areas based on the data listed above;
- Inspect all stormwater structures on municipal properties annually;
- Begin distribution of public education materials to four identified audiences;
- Identify areas of inappropriate pet waste management; and
- Develop an inventory of all floor drains within permittee-owned buildings.

Within two years of the effective date:

- Submit the storm sewer infrastructure map showing all stormwater utilities;
- Submit an inventory and priority ranking of MS4-owned property and infrastructure;
- Implement targeted management efforts for pet waste at identified locations;
- Submit a report assessing the current street design and parking lot guidelines;
- Amend the previously enacted ordinance (if completed under the 2003 Permit) for development/redevelopment post-construction stormwater standards;
- Distribute public educational materials about feeding waterfowl in targeted areas;
- Begin monitoring and sampling 25% of outfalls per year in both dry and wet weather;
- Submit an annual estimate of changes in impervious area in each sub-basin tributary to the stormwater system, both directly and indirectly connected, from both public and private projects; and
- For communities that ultimately discharge to Long Island Sound and those within the Cape Cod and Buzzards Bay watersheds, identify sources of nitrogen which discharge from or through the MS4.

Within 3 years of the effective date:

- Develop a report assessing existing local regulations to determine the feasibility of allowing or encouraging green infrastructure; and
- For communities with approved phosphorus TMDLs, develop a plan to assess the amount of phosphorus discharged.

Within 4 years of the effective date:

- Complete investigations of 50% of the storm sewer catchments; and

- For communities that ultimately discharge to Long Island Sound, implement practices such that nitrogen discharge levels are reduced.

Within 7 years of the effective date:

- For communities with approved phosphorus TMDLs, implement the plan to reduce phosphorus discharges.

By the end of the permit cycle:

- Monitor and sample all outfalls in both dry and wet weather; and
- Distribute a minimum of eight public educational messages.

Many of the individual requirements, on their own, would be achievable. However, requiring so many varied tasks of each community during a five-year permit cycle is unrealistic and is setting communities up for failure to comply. For this permit cycle, the program should be pared down to a list of achievable goals that build on the efforts that communities have already expended for compliance with the 2003 permit.

Financial Burden to Regulated Communities

For sample communities with 200 to 700 outfalls, the sampling and laboratory testing alone for 25% of the outfalls could cost upwards of \$40,000 to \$100,000 annually, depending on the parameters being tested. This is just one small component of the Draft Permit. While EPA has estimated compliance costs on the order of \$100,000, it is important to note that the Massachusetts **2002** Clean Water SRF had 19 stormwater planning projects that ranged from \$190,000 to \$750,000, with an average of a little over \$400,000. Combined with the labor costs required to develop and distribute public education materials, to conduct site investigations, to develop the data and mapping described above, to inventory and inspect municipal facilities, to inspect and enforce construction activities, to review site plans for proposed new development or redevelopment projects, and to develop and implement reports, policies and ordinances, the financial burden of the Draft Permit is excessive.

In Section 1.10 c, the permittee is “encouraged to maintain an adequate funding source for the implementation of this program. Adequate funding means that a consistent source of revenue exists for the program.” With only 120 days from the permit’s effective date to develop the Stormwater Management Plan and commit to particular measures for implementation, there is not adequate time for funding to be secured. Furthermore, a “consistent source of revenue” implies a funding mechanism such as a stormwater utility assessing user fees. This type of program could require years to develop and implement, normally requiring multiple levels of review and approval from town boards and committees, town counsel, town meetings or general elections, and sometimes the state legislature. At a time when communities are not flush with money, and when most communities do not have enterprise funds for addressing stormwater infrastructure needs, the financial obligations of the proposed regulations are insurmountable.

Pollutant Loading Offsets

Pollutant loading “offsets” are mentioned in the Draft Permit with regards to watersheds both with and without approved TMDLs. The Coalition is hopeful that this is a step in the direction of more holistic water resources planning, where trading could be between not only stormwater outlets discharging to a particular receiving water, but also between MS4 communities and a host of stakeholders involved in watershed management. This could include wastewater treatment facilities, agricultural operations, golf courses and impoundment managers.

Many communities are presently spending millions of dollars to upgrade their wastewater treatment facilities to meet stringent new pollutant goals. Some of these facilities can already attain levels below those required in TMDLs. Communities should be able to extend the benefit of their investment and offset some of the costs of stormwater treatment by meeting less stringent standards for stormwater, as long as the same total load can be achieved. Conversely, they should be able to invest in stormwater management and offset the need for additional wastewater treatment upgrades. Options for achieving offsets might also be present by provision of such in-stream improvements as impoundment removal or management, management of stream shading to reduce water temperature and management of aquatic vegetation. Other opportunities might also include better fertilizer management at agricultural operations and golf courses, which could be addressed as offsets to stormwater or wastewater treatment.

Watersheds with Phosphorus TMDLs

Based on the Draft Permit, communities with phosphorus TMDLs are required to meet unrealistic phosphorus reduction goals over a 7-year period, as specified in the tables in Appendix G. Presently, BMPs for stormwater phosphorus reduction are not well-developed. Furthermore, consistent guidance is needed in the permit regarding how to calculate the reduction potential associated with particular BMPs. Without presenting a consistent approach to calculating their reduction potentials, each community is likely to assess its achieved removal differently. In order to have an equitable program across cities and towns within the watershed, the permit documents must be more specific in this regard. A list of phosphorus-reducing BMPs should be provided as an appendix, with detailed instructions as to how to relate BMP implementation to a removal percentage for the flow that is affected by the BMP. This should apply to both structural and non-structural controls. Alternatively, one specific BMP guidance document should be referenced as the resource for all communities to perform these calculations. This will also minimize the frequency of phosphorus sampling required to assess compliance with the permit.

In addition to the need for more detailed and equitable methods of calculating reduction potential, the permit should address alternatives for highly urbanized areas where the installation of structural BMPs on public property may not be feasible. In these areas, communities can work with private property owners as properties are redeveloped to require BMPs on their sites. In the meantime, however, there may not be feasible approaches to meeting TMDL WLAs for phosphorus.

For all communities subject to phosphorus TMDLs, a phased approach with less stringent, achievable goals over a longer period of time is more appropriate at least until a range of feasible, cost-effective options for meeting water quality goals is developed through bona fide research and testing.

Shawsheen River Bacteria Reduction Requirements

In an August 2004 report entitled, "Evaluation of Stormwater Management Benefits to the Lower Charles River," prepared by Metcalf & Eddy for the EPA, 2000 cfu/100 mL is described as "the extreme of dry weather and wet weather stormwater quality that could occur if aggressive illicit connection removal is implemented, and all possible BMPs are applied to their fullest extent." The bacteria removal requirements in Appendix G of the draft permit are 200 cfu/100 mL (geometric mean) across Shawsheen River communities. Achieving these levels in urban stormwater discharges is not realistic.

Long Island Sound Tributary Nitrogen Reduction Requirements

The draft permit imposes nitrogen restrictions on discharges tributary to Long Island Sound. These restrictions include a 10% reduction in nitrogen from existing levels, and a requirement to limit nitrogen levels such that they are "maintained or decreased." These limitations are based on the assumption that the approved TMDL requires these limitations.

Such an assumption is incorrect. Although the approved TMDL references a 10% reduction in total nitrogen loads for out-of-basin sources, EPA's approval letter of the TMDL, and the TMDL itself, are clear that these are only assumptions made for the purpose of determining that there is "reasonable assurance" that the nonpoint source load reductions are achievable, and therefore that the detailed in-basin source reductions are appropriate. In particular, the TMDL includes the following language: "*the TMDL revision scheduled for 2003 will describe a framework for managing these out-of-basin sources and a schedule for implementing Phase IV nitrogen reduction actions.*" Until the TMDL Revision has been developed, subjected to public review and approved by the EPA, it is premature to include any limits on nitrogen in this permit based on the TMDL.

Assistance from the Regulatory Agencies

There are several areas in which the regulatory agencies could provide information that would greatly reduce the financial burden and time constraints imposed by the Draft Permit. These include the following, each of which is described in more detail below: (1) public education materials, (2) ordinances and policies, (3) GIS data, (4) BMP removal efficiencies and related data, and (5) coordination with other review agencies. The provision of impervious area and directly connected impervious area for each community in Section 2.4.6.9 is a good example of the type of information that should be provided to assist in compliance. We note also that this Draft Permit included many more links to such resources than the North Coastal Draft Permit, which will be of assistance to communities. As much as possible, the regulatory agencies should provide guidance documents and templates to meet the individual requirements of the permit.

Public Education Materials

For the required public education materials, having each community create their own language and graphics for brochures, websites, signs, etc., is an inefficient use of resources. Enough of the information on non-structural controls implementable by the public is generic and can be provided in a series of templates to communities. A few versions of this information could be developed depending on the size and demographics of each community or depending on the watershed. Similarly, for business and industrial user education, much of the information is generic and applies to all facilities. Specific recommendations regarding pet waste management, the use of alternative fertilizers, appropriate fertilizer application, and yard waste recycling, to name a few, are common to most locations. Templates could include areas where communities can input information specific to their locations. Providing these templates would greatly reduce duplicate efforts and costs.

Ordinances and Policies

Similar to public education materials, the regulatory agencies should provide suggested language for ordinances and policies. The Draft Permit requires the development of a number of specific policies and procedures, including those relating to illicit discharges, construction oversight, new development reviews, and management of municipal facilities. Again, much of this information is generic and could be provided to communities as a range of templates, where a community could select the provisions applicable to their needs from a list of potential wording. If five templates could be made for each ordinance, rather than one for each community, this, again, would greatly reduce duplicate efforts and costs. Furthermore, many communities are likely to have counsel review new bylaw language prior to its adoption. If the regulatory agencies provide only that language that has been reviewed from a legal perspective and is deemed appropriate and enforceable, this would further reduce the costs to communities.

GIS Data

Many of the data needs listed above are a part of state-wide or regional initiatives. For instance, water quality classifications and standards, identified impairments, data from watershed organizations, waste load allocations, and waterways with endangered species habitat are not specific to individual communities, but instead are applicable to reaches of receiving waters that cross town boundaries. Rather than each community seeking out this information individually, the Draft Permit should contain links to downloadable GIS data for all regional or state-wide data required to be used to comply with the permit requirements.

BMP Removal Efficiencies and Related Information

As described above, the regulatory agencies should provide means of calculating removal efficiencies based on particular BMPs to arrive at a fair and equitable accounting across all communities. This is especially true for non-structural controls, such as public education and outreach, detection and elimination of illicit discharges, source control, and good housekeeping. Results from these activities are hard to measure otherwise.

Coordination with Other Review Agencies

Reviews for the presence of and impacts to endangered species, specific habitats, historical resources, and archeologically significant areas are cumbersome for each community to coordinate individually, both for the communities and for the review agencies. The permitting

authorities should coordinate the reviews by these agencies with the comment periods and with particular future milestones, and all comments should be funneled through the permitting agencies to the applicants via formal comments. The Draft Permit describes activities as minor as constructing a ditch or installing a new catch basin as requiring the community to contact the review agencies due to the disturbance of land, especially in relation to archeological resources. A more streamlined process is required for obtaining input from these agencies on minor activities such as these.

Other Comments

The following is a list of miscellaneous comments that apply to topics other than those discussed above:

- The monitoring of 25% of outfalls each year in both wet and dry weather conditions is cumbersome, costly, and unreasonable. This should be lowered to a more achievable level, such as 10% per year, starting with known problem areas. Because of the vagaries of stormwater quality, wet weather monitoring is of little value. Such monitoring should be kept to a minimum with representative sampling rather than monitoring of all outfalls. Representative sampling could be used to provide a general overview of stormwater quality. This overview will no doubt affirm what is already well known and documented – stormwater quality is highly variable and can be very poor.
- For receiving waters both with and without approved TMDLs (Sections 2.2.2 and 2.3.1), requiring the installation of BMPs in municipal systems to meet all impaired water quality standards is an enormous and expensive undertaking.
- Many, if not most, of the TMDLs cited in this draft permit are questionable as to their scientific basis and applicability to a regulatory program. There are inconsistencies in the development of TMDLs that may lead to imposition of costly requirements on some communities and not others. If TMDLs are to form the basis for assigning enforceable water quality improvements to permittees then the quality of TMDLs needs to be re-evaluated and held to a higher standard.
- The permit states that the regulations only apply to the “urbanized” areas of each community – those with at least 500 people per square mile – and that “irrigation water” is excluded as a non-stormwater discharge. This may result in an exclusion of agricultural areas, which tend to be major contributors to stormwater pollution, especially with regard to nutrients. The regulatory agencies would be remiss to require such stringent requirements to meet WLAs from urbanized areas but not include agricultural inputs.
- In Section 2.3.3 – Antidegradation, item (b) requires that for “discharges to tier II waters as defined by 314 CMR 4.04 the permittee shall demonstrate to the satisfaction of MassDEP that the discharge will cause no significant lowering of water quality by documenting one or more of the following: ... (iii) The discharge does not cause a significant lowering of water quality because the effluent will be of a quality equal to or

better than the existing water quality of the receiving water...” This should be clarified, as it implies that water quality standards do not need to be met in water bodies where they are not presently being met. This rationale could be used by all permittees discharging to tier II waters to maintain the status quo.

- Several of the data needs may require data from adjacent communities or from entities other than the MS4 communities being regulated. For instance, if the sanitary sewers are owned and operated by a different entity, such as a sewer district, the MS4 community may be relying on the adequacy and quality of their data to meet some of the permit requirements. This applies to information on sewer locations, ages, sanitary sewer overflows (SSOs), etc. Similarly, where this situation exists, requiring correction of SSOs may be more challenging if they are not within the community’s jurisdiction.
- The permit mentions that areas with sanitary sewers over 50 years old should be considered as having a high illicit discharge potential. Note that in some communities, the majority of sewers are over 50 years old. Therefore, a further division of priority areas would be required.
- Section 5.1.5 states that “EPA or MassDEP may require the permittee to add, modify, repair, replace or change BMPs or other measures” at any time. This is open-ended and onerous. More specific allowances should be made for how long a community will be given to make changes if they are requested or required by the regulatory agencies.
- Section 2.4.4.2 accurately recognizes that 6 months is not enough time to pursue and resolve a legal dispute with a discharger unwilling to comply; this could take years, and no time limit should be placed on such a dispute where it is beyond the control of the community.
- The requirements for construction site stormwater runoff control represent an improvement over the present General Construction Permit. Enforcement is often lacking with the present program, and having communities more involved with construction within their limits should help to mitigate the impacts of construction-related erosion and sedimentation. There could be a substantial reduction in pollutants from this alone, and the requirements appear to be reasonable and achievable.
- Similarly, post-construction stormwater management from new development and redevelopment are also “low-hanging fruit.” The application of the existing DEP stormwater management standards to upland areas outside of the Massachusetts Wetlands Protection Act jurisdiction is appropriate. These are standards that have been implemented in and around wetland resource areas for a number of years and are tested, implementable, and enforceable.
- The requirements for good housekeeping and pollution prevention from municipal facilities all appear to be reasonable and achievable, with the exception of the following two provisions: (1) Investigating municipal buildings to identify all floor drains may be a challenging task, especially in a 1-year timeframe, if large facilities such as school

buildings and public meeting spaces are included; (2) The requirement to clean all catch basins when they are 50% full could require frequent cleaning of all catch basins in areas where deep sump basins have not yet been installed and may be excessive compared to the associated benefit. Agencies responsible for catch basin cleaning strive to maximize efficiency in light of local budgets and staff shortages. Greatest efficiency is realized when catch basins are cleaned following a geographic pattern, i.e., all basins in a given area are cleaned one after the other before moving on to a new area. Cleaning basins when they become 50% full is contrary to efficient use of manpower and cannot be implemented in a practical way. Furthermore, the inspection and cleaning of stormwater structures should be modified to be at the same frequency, allowing both to be performed at once.

- The requirements to measure and monitor changes in impervious area (Section 2.4.6.9), while an interesting academic exercise, provides little benefit to the municipal stormwater manager. This exercise will be burdensome and will take staff away from more valuable functions. If change in impervious surface over time is a metric of interest to Federal and State regulators then perhaps every 10 years the regulators can utilize advances in satellite imagery or other statewide GIS data to track this information. Stormwater managers should not be charged with gathering data that does not provide them with useful information.
- The Coalition agrees with the requirements for stormwater inputs into drinking water supply areas (Section 4.1) and the encouragement of groundwater recharge where feasible (Section 4.2).
- Where some of the permit requirements extend for a period of 10 years, it seems that record keeping should be required for longer than a five-year period.

In conclusion, while the Coalition agrees with the regulation of stormwater inputs to maintain high water quality, the Draft Permit as presented includes several requirements that are not achievable by many communities and do not take into account time and budget constraints that affect cities and towns. The permit should be scaled back, especially in the areas of mapping, outfall monitoring and sampling, and loading requirements, to include achievable, cost-effective goals during the course of the five-year permitting period. The final permit should present a means of building upon previous efforts to achieve continuous improvements to water quality in a rational, feasible manner. The CWA stipulates that municipal stormwater systems must remove pollutants to the maximum extent practicable. That is the standard to which this permit must be written in its entirety. The Coalition believes EPA has gone well beyond practicable in many of its requirements and needs to reconsider its timelines, expectations and stipulations. If communities are presented with a permit they can meet, that is within their means and advances the concept of continual improvement, they are more likely to successfully invest the necessary funds and labor into implementation.

We appreciate the opportunity to submit comments on the Draft Massachusetts Interstate, Merrimack, and South Coastal Small MS4 General Permit. Please do not hesitate to contact me with any questions. I can be reached at 508-799-1430 or at MoylanR@worcesterma.gov.

Sincerely,

MASSACHUSETTS COALITION FOR WATER RESOURCES STEWARDSHIP, INC.



Robert L. Moylan, Jr., P.E., President
Commissioner, Department of Public Works and Parks
City of Worcester
20 East Worcester Street
Worcester, MA 01604

Cc: H. Curtis Spalding, Regional Administrator, US EPA
Secretary Richard K. Sullivan, Jr., EOEEA
Commissioner Kenneth L. Kimmell, MassDEP
Senator Scott Brown
Senator John F. Kerry
Congressman Michael Capuano
Congressman Barney Frank
Congressman William Keating
Congressman Stephen F. Lynch
Congressman Edward J. Markey
Congressman James McGovern
Congressman Richard E. Neal
Congressman John W. Olver
Congressman John Tierney
Congresswoman Niki S. Tsongas