



# Minnesota Pollution Control Agency

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July 24, 2008

TO: INTERESTED PARTIES

RE: NPDES/SDS General Permit No. MN R100001 for  
Discharges of Stormwater Associated with Construction Activity

On July 22, 2008, the Minnesota Pollution Control Agency (MPCA) Citizens' Board voted to approve the Findings of Fact, Conclusions of Law, and Order approving the issuance of the National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) General Permit No. MN R100001 for Discharges of Stormwater Associated with Construction Activity, Statewide. The Findings of Fact, Conclusions of Law, and Order document concludes that the decision to issue the NPDES/SDS General Permit No. MN R100001 for Discharges of Stormwater Associated with Construction Activity satisfied the requirements of Minn. Stat. ch. 116D.

We appreciate the time and effort of those who submitted comments on the NPDES/SDS General Permit No. MN R100001 for Discharges of Stormwater Associated with Construction Activity.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Moore", is positioned above the printed name.

Brad Moore  
Commissioner

BM/ML:gs

**STATE OF MINNESOTA  
MINNESOTA POLLUTION CONTROL AGENCY**

**IN THE MATTER OF A REQUEST FOR A  
CONTESTED CASE HEARING AND  
REISSUANCE OF THE NPDES/SDS  
GENERAL PERMIT MNR100001 FOR  
STORMWATER ASSOCIATED WITH  
CONSTRUCTION ACTIVITY**

**FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND ORDER**

The above-entitled matter came before the Minnesota Pollution Control Agency (MPCA) Citizens' Board (Board) at a regular meeting held in St. Paul, Minnesota, on July 22, 2008. Based on the record before it, the MPCA hereby makes the following Findings of Fact, Conclusions of Law, and Order.

**FINDINGS OF FACT**

This matter involves the proposed National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) General Permit MN R100001 (Permit or NPDES/SDS Permit) for discharges of stormwater associated with construction activity. During the public comment period on the draft Permit, the Builders Association of the Twin Cities (BATC) requested a contested case hearing. The MPCA must decide under applicable statutes and rules: (1) whether to grant or deny, in whole or in part, the request for a contested case hearing, and (2) whether to reissue the Permit.

**A. Jurisdiction**

1. The MPCA is authorized and required to administer and enforce all laws relating to the pollution of any waters of the state. Minn. Stat. § 115.03, subd. 1(a).
2. The MPCA has authority to reissue this Permit and to rule on the contested case hearing request on the Permit. Minn. Stat. chs. 115 and 116, and Minn. R. chs. 7000, 7001, and 7090.
3. The MPCA was authorized and delegated by the U.S. Environmental Protection Agency (USEPA) in June 1974 to administer the NPDES program. 40 CFR § 122.28.
4. USEPA approved the MPCA's NPDES general permit program on December 15, 1987.
5. Under the federal Clean Water Act, the MPCA is required to issue NPDES permits for stormwater discharges. 33 U.S.C. § 1342 (p).
6. Congress amended the Clean Water Act in 1987 to require a two phased program for stormwater discharges under the NPDES program.
7. USEPA promulgated regulations governing the implementation of Phase I and Phase II of the NPDES stormwater permitting program on November 16, 1990, and December 8, 1999, respectively.

8. The USEPA's joint Phase I and Phase II program addresses stormwater discharges from construction activities that result in the disturbance of land of equal to or greater than one (1) acre. The MPCA's NPDES/SDS Permit for construction activity requires permittees to develop and implement a Stormwater Pollution Prevention Plan (SWPPP) that includes best management practices (BMPs) to address the potential for discharge of sediment and/or other potential pollutants from the construction site.

## **B. Background**

9. The MPCA, as the state's NPDES/SDS permitting authority, has issued NPDES/SDS general permits for discharges of stormwater associated with construction activity since 1993. These prior general permits were NPDES/SDS Permit No. MN R100000 (1993-1998), NPDES/SDS Permit No. MN R110000 (1998-2003), and NPDES/SDS Permit No. MN R100001 (2003-2008).
10. In this immediate matter, MPCA is reissuing the existing NPDES/SDS General Permit No. MN R100001 (Permit or NPDES/SDS Permit) with several modifications to meet federal and state requirements for impaired waters, and to address several key issues MPCA identified as needing revision and/or clarification in this Permit reissuance including revised requirements for change of permit coverage, training, temporary and permanent cover, ditch stabilization and concrete washout areas.

## **C. Public Notice/Public Comment**

11. The MPCA provided for stakeholder involvement in this Permit reissuance. These stakeholders included builders, developers, associations (trade, industry, and government), local units of government (City, County, Soil and Water Conservation Districts), state agencies (Minnesota Department of Transportation (MNDOT), Minnesota Department of Natural Resources (DNR), Board of Water and Soil Resources, Metropolitan Council), federal agencies (USEPA Region 5), the University of Minnesota, and consultants. Input on reissuance of the Permit was sought beginning in February 2007. The first large group stakeholder meeting was held on May 16, 2007, to solicit input on several issues MPCA staff identified as needing to be addressed in this Permit reissuance. Following initial permit revisions, three additional stakeholder meetings were held to review draft Permit language on September 26, October 30, and November 29, 2007. The MPCA also had numerous meetings with individual stakeholders including MNDOT, builders, developers, associations, and consultants during the Permit revision process.
12. The MPCA formed a separate stakeholder work group consisting of builders, developers, BATC, and individuals representing municipalities, to identify issues with the existing requirements for changes in permit coverage, and to revise the change in coverage process. Meetings with this work group were held on August 20, September 17, and October 8, 2007.
13. In accordance with the requirements of Minn. R. 7001.0100 and Minn. R. 7001.0210, subp. 4, the MPCA prepared a draft NPDES/SDS Permit and gave the public an opportunity to comment on the draft NPDES/SDS Permit. The draft NPDES/SDS Permit was on public notice February 25 to March 26, 2008.

14. The MPCA held one public informational meeting on the draft Permit during the comment period at the MPCA St. Paul office, and at the MPCA Regional Offices in Brainerd, Detroit Lakes, Duluth, Mankato, Marshall, Rochester, St. Paul, Willmar, and the DNR St. Paul office using video conferencing technology. This public information meeting was noticed as part of the draft NPDES/SDS Permit public notice.
15. The MPCA received 33 written comment correspondence during the comment period. Copies of the comments were provided to the MPCA Board at the July 22, 2008, MPCA Board meeting. Finding No. 16 summarizes some of the changes made in the draft NPDES/SDS Permit as a result of the comments. MPCA responses to comments are found in Attachment 3 to the July 22, 2008, MPCA Board Item and are incorporated into these Findings.
16. The MPCA reviewed and considered all comments received and made additional revisions to the draft NPDES/SDS Permit to provide clarification of requirements in several Permit terms and conditions, including the following:
  - a) Part I.B.6. Established a timeframe associated with DNR approval.
  - b) PART.II.B.3.a and d. Clarified that review procedure cannot be avoided using online application.
  - c) PART II.B.3.d. Revised for clarity.
  - d) PART II.B.5.c. Clarified, both signatures are required.
  - e) PART II.C.2.b. Changed terminology for clarity.
  - f) PART III.A. Added acronym.
  - g) PART III.A.2.ii & iii. Modified training requirements to allow supervisors of BMP installation maintenance and repair to be trained.
  - h) PART III.A.4.b. Revised to clarify when the estimated quantities tabulation is required.
  - i) PART III.A.4.c. Added new part describing “new impervious surface.”
  - j) PART III.A.4.d. Revised for clarity.
  - k) PART III.A.4.g. Changed distance requirement for mapping.
  - l) PART.III.A.5.b. Added “nuisance conditions.”
  - m) PART III.A.8. Established PART III.B.2. Clarified when a temporary basin is needed.
  - n) PART III.C. Changed documentation to be required in 72 hours.
  - o) PART III.C.2. Added reference to “potential stormwater hotspots.”
  - p) PART III.C.2.f. Changed “and” to “or.”
  - q) PART III.A.8. Established a timeframe associated with DNR approval.
  - r) PART III.C.2.h. Removed reference to industrial areas with exposed significant materials.
  - s) PART III.C.3. Clarified mitigative sequence requirements.
  - t) PART III.D. Revised to allow SWPPP to be off site during non-working hours.
  - u) PART IV.B.3. Rewrote entire section based on all comments.
  - v) PART.IV.C.1.b. Added “or redundant BMP’s.”
  - w) PART IV.C.4. Added a provision for when written approval cannot be obtained.
  - x) PART IV.C.5. Revised to allow soil stockpiles to be placed in a ditch with a bypass.
  - y) PART IV.E.2.g. Removed inspection mapping requirement.
  - z) PART IV.F.4. Revised to allow clay liner.
  - aa) PART V.A.3. Added citizen petition for individual permit.
  - bb) PART V.E. Revised form terminology.
  - cc) Appendix A.C.3. Added “redundant.”
  - dd) Appendix.A.C.4. Added “or are reduced.”
  - ee) Appendix B. Removed redundant terms.
  - ff) Appendix B. Added definition of “Public Waters.”

17. One request for a contested case hearing was received from the Builders Association of the Twin Cities. This request is addressed in the Findings below in part, and in the MPCA responses to comment, in part.

**D. Contested Case Hearing Determination**

18. The MPCA must determine if a request for a contested case hearing meets certain criteria specified in Minn. R. ch. 7000. Minn. R. 7000.1800 requires a person requesting a contested case hearing to state the issues they propose to address, the specific relief requested or resolution of the matter, and the reasons supporting an MPCA decision to hold a contested case hearing.
19. The MPCA's decision on whether to hold a contested case hearing is governed by Minn. R. 7000.1900, subp. 1 which states:

*Subpart 1. Agency decision to hold contested case hearing. The agency must grant the petition to hold a contested case hearing or order upon its own motion that a contested case hearing be held if it finds that:*

- A. there is a material issue of fact in dispute concerning the matter pending before the agency;*
  - B. the agency has the jurisdiction to make a determination on the disputed material issue of fact; and*
  - C. there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the agency in resolving the disputed facts in making a final decision on the matter.*
20. The burden is on BATC, as the petitioner, to demonstrate that all three criteria have been met.
21. To satisfy the first test of whether there is a material issue of fact in dispute, the petitioner must show that the specific fact will affect the outcome of the case. *O'Malley v. Ulland Brothers*, 549 N.W.2d 889 (Minn. 1996). This is a standard used in summary judgment motions before Minnesota courts and provides the MPCA some guidance in considering the petitioner's request for a contested case hearing. In this context the petitioner has to show the existence of a new genuine issue of fact, the resolution of which may affect the outcome of the case, and may not just rely on mere allegations of factual dispute. *Nicollet Restoration Inc. v. City of St. Paul*, 533 N.W.2d 845 (Minn. 1995).
22. For the second test, the petitioner must show that the MPCA has jurisdiction or authority to make a determination on the material factual issue. "Agencies are not permitted to act outside the jurisdictional boundaries of their enabling act" *Cable Communications BD v. Nor-West Cable*, 356 N.W.2d 658, 668 (Minn. 1984). This means that each issue in the contested case request has to be such that it is within the authority of the MPCA to resolve.
23. To meet the third test, the petitioner has the burden of demonstrating there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the MPCA in resolving the

disputed facts in making a final decision on the matter. This burden includes demonstrating the existence of material facts that would aid the MPCA in making a decision before the petitioner is entitled to a contested case hearing. *Matter of NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 404 (Minn. App. 1988). To do so, the petitioner may provide the MPCA with specific experts' names, and with an indication of what specific *new facts* an expert might testify to at a contested case hearing. The Minnesota Supreme Court has recognized that to meet this test, "it is simply not enough to raise questions or pose alternatives without some showing that evidence can be produced which is contrary to the action proposed by the MPCA." *In the Matter of Amendment No. 4 to Air Emission Facility Permit*, 454 N.W.2d 427, 430 (Minn. 1990).

#### **E. BATC's Request for Contested Case Hearing**

24. BATC was involved in the stakeholders meetings that MPCA held prior to the formal public comment period on the draft NPDES/SDS Permit. MPCA staff met with BATC on December 19, 2007 on the draft Permit.
25. BATC's comment letter dated March 26, 2008, requests a contested case hearing. A letter from BATC's legal counsel, also dated March 26, 2008, requests a contested case hearing on behalf of BATC and incorporates the BATC comment letter dated March 26, 2008.
26. The MPCA finds approximately 29 issues raised in BATC's comment letter and request for a contested case hearing including, but not limited to: (1) whether the draft permit's limitations on transferability, termination and continuing liability are justified; (2) whether the proposed revisions offered by BATC are necessary to make the draft permit more reasonable; (3) whether the benefits of the draft permit provisions are justified in light of the costs they will impose; (4) whether the proposed regulations are feasible; and (5) whether the draft permit needs further flexibility to prevent it from being arbitrary. BATC seeks specific relief as proposed in 24 of the issues alleged in the comment letter, and including resolution of issues relating to permit termination, liability, and impaired and special waters.
27. The MPCA has changed the Permit to provide further clarification of requirements in the following locations as requested by BATC:
  - a) PART II.B.1.b. Added language regarding sediment and sediment related parameters.
  - b) PART III.A. Added "modify the original SWPPP."
  - c) PART III.A.2.d. Revised use of semi-colons.
  - d) PART IV.E.1. Revised for clarity.
  - e) PART IV.G.6. Revised for clarity.
28. The MPCA has also changed the Permit in the following locations as requested by BATC and other commenters:
  - a) PART III.A.2.a.ii & iii. Modified training requirements to allow supervisors of BMP installation maintenance and repair to be trained, in lieu of all workers needing to be trained.
  - b) PART III.A.4.b. Revised to clarify when the estimated quantities tabulation is required.
  - c) PART III.D. Revised to allow SWPPP to be off site during non-working hours.
  - d) PART IV.B.3. Rewrote entire section based on all comments.

29. MPCA staff met with representatives of BATC on May 9, 2008, to discuss their contested case hearing concerns and issues regarding the draft Permit terms and conditions. BATC and MPCA agreed to conduct this meeting in an effort, at a minimum, to narrow the issues that should be considered by MPCA for hearing.
30. As a result of the meeting with BATC, the MPCA has made changes and further clarifications in the Permit (see Findings 31-46). The specific BATC comment numbering below reflects the numbering of BATC's comment letter dated March 26, 2008.
31. BATC Comment No. 1. As requested by and discussed with BATC, the MPCA amended Part II.B.1.b to identify the sediment and sediment-related pollutant(s) or stressor(s) for waters identified as impaired pursuant to section 303(d) of the Clean Water Act, that trigger the requirement for project review under this Part. The identified pollutant(s) or stressor(s) are phosphorus (nutrient eutrophication biological indicators), turbidity, dissolved oxygen, or biotic impairment (fish bioassessment, aquatic plant bioassessment and aquatic macroinvertebrate bioassessment).
32. BATC Comment No. 3. As requested by and discussed with BATC, the MPCA has agreed to clarify that the intent of Part II.C.2.b, is to allow the Permittee(s) to terminate coverage for a portion of their entire project, provided specific requirements are met. It is the MPCA's intent to terminate a permit holder from permit coverage if notice of termination (NOT) requirements are met, including permit compliance at time of termination. Part II.C.1 states "The Permittee(s) coverage under this permit terminates at midnight on the postmark date of the NOT, or on the date an online NOT is submitted to the MPCA". The MPCA believes the Permit is clear on termination of the Permittee(s)' responsibilities when permit coverage is terminated. The supplemental information document on Change of Permit Coverage and Termination of Permit Coverage, which was made available with the draft Permit on the MPCA Construction Stormwater Web site at [www.pca.state.mn.us/water/stormwater/stormwater-c.html](http://www.pca.state.mn.us/water/stormwater/stormwater-c.html), further explains the requirements of Part II.C. Also see response to comment 14-3.
33. BATC Comment No. 5. As requested by and discussed with BATC, Part III.A of the Permit was changed to add language that the new owner or operator can "modify the original SWPPP" for the project. The original requirement provided that when the owner or operator changes, the new owner or operator can implement the original SWPPP created for the project or develop and implement their own SWPPP. This change acknowledges that subsequent owners and operators can also modify SWPPPs.
34. BATC Comment No. 6. As requested by and discussed with BATC, Part III.A.2.a.ii. and iii was changed to add language that requires supervisors of BMP installation, maintenance and repair to be trained, in lieu of requiring all individuals working on the site to be trained. The draft Permit did not include the training requirement for supervisors. The MPCA agrees that construction site personnel who have supervision over individuals performing these activities should be trained so they will know if these activities are being carried out correctly. In the same provisions, the MPCA also clarified the language requiring inspectors to receive training; the reference to inspectors was moved from Part III.A.2.a.iii to Part III.A.2.a.ii.
35. BATC Comment No. 7. As requested by and discussed with BATC, the MPCA has changed Part III.A.2.d to correct punctuation.

36. BATC Comment No. 8. As requested by and discussed with BATC, Part III.A.4.b of the Permit was amended to clarify MPCA's intent that the estimated quantities tabulation be an initial calculation, made prior to the start of a project, to assist the contractor bidding and to adequately budget for necessary BMPs. The change to Part III.A.4.b makes it clear that the contractor must have an estimated tabulation prior to the start of a project.
37. BATC Comment No. 14. As requested by and discussed with BATC, Part III.B.2 was changed to clarify that the temporary (or permanent) basin is only required until the drainage area of the basin is stabilized. The original requirement intended that a temporary sediment basin be in place until the site is stabilized. Requiring that "permanent cover is established for the entire drainage area of the temporary basin" maintains the original intent of the requirement in Part III.B.2.
38. BATC Comment No. 15. As requested by and discussed with BATC, the MPCA has changed Part III.D to address BATC's concern regarding the safe keeping of original documents (e.g. the SWPPP, and inspection and maintenance records) on construction sites which can be prone to theft, tampering or damage. The intent of the requirement to have the SWPPP on site during construction is so that the SWPPP is available to inspectors visiting the site, and so regulated parties know how to comply with the Permit requirements and implement the SWPPP. The original document does not have to be on site or sent to the MPCA as long as copy(s) are readily available. The change to Part III.D makes it clear that the original, or a copy of the SWPPP is required to be kept on site and only during normal working hours.
39. BATC Comment No. 17. As requested and discussed with BATC, Part IV.B.3 of the Permit was changed to clarify when erosion prevention practices must be implemented for temporary or permanent drainage ditches or swales. BATC suggested that ditches used as temporary sediment containment systems not be required to provide temporary stabilization.
40. Erosion from concentrated flow areas, such as ditches that are not stabilized, will lead to erosion of the ditch bottom and side slopes during rain events that cause runoff to the ditch system. The MPCA acknowledges the requirement in the draft Permit that stabilization of *all* ditch bottoms within 24 hours may be difficult to meet in all circumstances. Part IV.B.3 of the draft Permit has been revised and now requires the last 200 lineal feet to be stabilized within 24 hours after connecting to a surface water.
41. Temporary or permanent ditches or swales used as sediment containment systems (with properly designed rock ditch checks, bio rolls, silt dikes..., etc.) are a good approach in some cases for controlling sediment generated from a construction site, and ditches used for this purpose should not need stabilization. Temporary or permanent ditches used as sediment containment systems during construction will need frequent maintenance to remove the accumulated sediment. Therefore, it is reasonable that these sediment containment systems be stabilized within 24 hours after no longer being used for that purpose.
42. BATC Comment No. 18. As requested by and discussed with BATC, Part IV.E.1 of the Permit was changed to clarify when site inspections must be conducted. The Permit requires an inspection once every seven days during active construction and within 24 hours after a specified rainfall event. The change to Part IV.E.1 makes it clear that following an inspection which occurs within 24 hours after a rainfall event, the next inspection must be conducted within seven days after the rainfall event, not sooner based on the original inspection schedule.



43. BATC Comment No. 22. As requested and discussed with BATC, the MPCA has changed Part IV.G.6 to clarify that the Permittee does not need to meet the requirements for final stabilization of residential and agricultural construction activities if they are not applicable. Reference to the applicability of Part IV.G.4 and Part IV.G.5, stabilization requirements for residential and construction activities, was added to Part IV.G.6.
44. BATC Comment No. 24. As discussed with BATC, the MPCA will not create a new Part V.I. of the Permit, as requested by BATC, to point Permittees to the Minnesota Stormwater Manual and unnamed MPCA guidance documents. The MPCA currently references the Minnesota Stormwater Manual and other guidance manuals in Permit Parts III.C.2, C.2.f, and Appendix B.1, where the MPCA believes reference to this additional guidance may be beneficial to the Permittee.
45. The MPCA believes that adding BATC's proposed language under Part V of the Permit's General Provisions may create confusion for Permittees. The Part V General Provisions are the general terms and conditions that the Permittee must comply with. The BATC proposed language, which references MPCA guidance documents, is not a permit requirement and therefore does not need to be added as a separate part under the General Provisions of the Permit.
46. The MPCA has developed an extensive amount of guidance regarding the Construction Stormwater Program and Permit. The MPCA will continue to identify the location of this guidance in the electronic and paper Permit application and instructions, and during training events on the Permit requirements.
47. The MPCA received a letter from BATC, dated May 29, 2008, in which BATC confirmed acceptance of Permit changes that address their March 26, 2008, comment No. 1 regarding sediment related parameters, and comments Nos. 3, 5, 6, 7, 8, 14, 15, 17, 18, 22 and 24 (see Findings 31-46).
48. In BATC's May 29, 2008 letter, BATC proposed the MPCA insert new language in Part IV.B.3 "and do not discharge to waters of the state or adjacent properties" after "...silt dikes, etc.)" and before "do not." BATC also suggested "14 days" instead of "24 hours" as the timeframe for when temporary or permanent ditches or swales no longer being used as sediment containment systems must be stabilized. BATC did not raise these issues previously in their March 26, 2008, comment letter and request for contested case hearing.
49. The MPCA believes that BATC's language insertion proposed in the May 29, 2008, letter is too restrictive. This option would become unuseable for Permittees by no longer allowing ditches to be used for sediment containment systems if they discharge to waters of the state or up to the property boundary because BATC's proposed requirement would apply to most ditches of this type. Further, there is no stabilization required in ditch bottoms used as sediment containment systems. The 24 hour timeframe is reasonable because the Permittee can schedule when they want to stabilize the area. Stabilization does not need to occur until the Permittee determines when the ditch is no longer used as a sediment containment system and can be removed. Therefore, because the Permittee makes this determination and can wait to remove the sediment containment measures in the ditch until scheduling the installation of stabilization BMPs, the 24 hour timeframe does not create a hardship for the Permittee.

50. BATC's additional Permit change requests and remaining outstanding concerns regarding BATC's contested case hearing request are addressed in Findings 51-154.

***Special Waters and Impaired Waters***

51. In BATC's March 26, 2008, comment letter, BATC requested changes to the draft Permit relating to the Appendix A.B additional BMP requirements for special waters and impaired waters. BATC's requested changes are identified in BATC comments No. 1, 2, 9, 10, 12, and 13, and are addressed in these Findings.
52. Appendix A.B of the Permit, Requirements for Discharges to Special Waters and Impaired Waters, requires additional BMPs for "those areas of the project draining to a discharge point on the project that is within one mile of a special or impaired water and flows to that special or impaired water." The existing NPDES/SDS General Permit No. MN R100001, Appendix A.B, Requirements for Discharges to Special Waters, requires additional BMPs for "those areas of the project draining to a discharge point on the project that is within 2,000 feet of a special water and flows to that special water." Special waters include Wilderness areas, portions of the Mississippi River, Scenic or recreational river segments, Lake Superior, Lake Trout Lakes, Trout Lakes, Scientific and natural areas, and Trout streams. The existing Permit provides additional environmental protection to these outstanding resource value waters and trout waters through additional BMPs beyond those required for construction stormwater discharges to regular waters. The proposed Permit takes some of the same BMPs for increased protection that have been in place for the last five years for special waters and applies them to construction projects in the vicinity of impaired waters. Waters that are impaired do not meet water quality standards. These standards define how much of a pollutant can be in the water and still allow it to meet its designated uses such as drinking water or aquatic recreation.
53. BATC requested additional language be inserted in Permit Part II.B.1.b, Part II.B.3.b, Part III.A.9, and 9.a, Part III.A.9.b, and Part III.A.9.d, relating to the Appendix A additional BMP requirements for special and impaired waters. BATC requested that after the phrase "projects that have a discharge point on the project that is within" the following language be inserted: "2000 feet as measured along the center line of the hydraulic flow path" of, and flows "directly" to..." BATC also requested additional language in Part II.B.1.b.i to allow certain sites be exempted from the additional BMP requirements.
54. Findings 55-93 address BATC's request that 1) 2,000 feet replace one mile, 2) the 2,000-foot distance be "measured along the center line of the hydraulic flow path," 3) the word "directly" be added as follows: "a discharge point on the project ....flows 'directly' to a special or impaired water", and 4) MPCA provide an exemption from the requirement that additional BMPs be provided for certain sites.

***Special Waters and Impaired Waters - One Mile***

55. BATC requested 2,000 feet as the distance for when the requirements for additional BMPs for discharges to special and impaired waters should apply. BATC asserts that "The expanded distance (of one mile) is not supported by science, it is arbitrary, it is overly broad and vague, and it raises serious anti-backsliding concerns." BATC requests that MPCA retain the 2,000 feet limit unless there have been demonstrated problems with sites discharging greater than 2,000 feet.

56. MPCA's Permit record demonstrates that the current 2,000-foot provision for additional BMPs does not adequately address state and federal requirements and that the additional one-mile provision is a reasonable step, especially for impaired waters. Based on the scientific and technical data in the record and as summarized in part in Findings 57-79, MPCA believes that one mile, and the Appendix A.C additional BMPs, are appropriate.
57. Pollution can occur as a result of the rainfall-to-sediment transport process. When the rainfall intensity is higher than the soil infiltration rate, rainfall flows over the soil surface and is called stormwater runoff. Stormwater runoff, along with the impact of the raindrop itself, detaches and transports soil and other particles that are in the soil surface. These particles may be carried over considerable distances before they fall out of suspension and are deposited. Erosion is the detachment of particles from the soil. Erosion is greater when the soil surface is bare, the soil is very erodible, and the storm energy, slope length and steepness are high. The Universal Soil Loss Equation (USLE) is commonly used to predict erosion from construction sites.
58. Appendix A.C contains additional BMP requirements for temporary cover and permanent stormwater management for projects that are within one mile of special or impaired waters and have runoff from the project that flows to those waters. For most sites, the Permit requires exposed soils to be stabilized within 14 days after construction is complete in that area. For projects within one mile of special or impaired waters, the Permit requires stabilization within seven days to provide additional protection for these waters.
59. Historical records indicate that in Minnesota, the probability of having a rainfall event that occurs within seven days after another rainfall event, during the construction season (June – September) is 92 percent (see Appendix A to Attachment 3). With the additional BMP requirement, soils are stabilized seven days sooner than otherwise required. Therefore, MPCA staff evaluated various rainstorm events on sites with bare soils (first with stabilization occurring between 8 and 14 days after the rainfall, as if the Appendix A requirement were not in place) and on sites required to comply with the quicker timeframe for stabilization (cover within seven days as in Appendix A).
60. MPCA staff modeled a theoretical nine-acre site with site conditions and soils typical of Minnesota (see Appendix B to Attachment 3) for various rainstorm events that are typical in Minnesota. This modeling showed that in the seven days without cover, a rainstorm event of two inches in 24 hours resulted in 421.9 tons of sediment being discharged from the site for one event. If the Appendix A.C temporary cover requirements were in place and the soils would not have been bare, the resultant sediment discharge from the site would have been 50.6 tons.
61. The calculations show that clay-sized soil particles travel greater than one mile before settling out of the water column. For example, a particle of clay, in 0.5 feet of stormwater that has a velocity of 2 feet per second, will travel about seven miles (see Appendix C to Attachment 3).
62. The MPCA has used aerial surveillance on occasion during this past five-year permit cycle, for inspection of construction stormwater sites. Aerial photographs have shown travel distances for suspended particles greater than 2,000 feet. The resulting discharge of sediment into receiving waters caused large plumes and severe water quality impacts (see Appendix D to Attachment 3).

63. The Appendix A.C permanent stormwater management requirement increases the amount of runoff required to be treated from one-half inch of runoff per acre of new impervious surface to one (1) inch of runoff per acre of new impervious surface created by the project. The requirement specifies that the first half inch of runoff must be infiltrated if site conditions allow. Small storm hydrology is typically most important in the design of water quality protection whereas large storm hydrology is used to evaluate quantity related design for control of stormwater runoff rates and/or volumes. Small storms are focused on for water quality because research has shown that pollution migration associated with frequently occurring events accounts for a large percentage of the annual load. This is because of the “first flush” phenomenon of early storm wash-off and the large number of events with frequent return intervals (see Appendix E to Attachment 3). Rain events between 0.5 inches and 1.5 inches are responsible for about 75 percent of the runoff pollutant discharges (MPCA Protecting Water Quality in Urban areas, 2000).
64. The Precipitation Frequency Analysis done for the Minnesota Stormwater Manual (2005) shows that 88 percent of the cumulative depth of rainfall would be treated by a BMP sized for a one inch event. Additionally, Appendix A.C.2 calls for the first one half inch of runoff from impervious surfaces to be infiltrated if site conditions allow. An infiltration BMP sized to infiltrate the first one half inch of runoff would infiltrate approximately 60 percent of the cumulative depth of rainfall on an average annual basis - which is necessary to mimic natural conditions and recharge ground water (see Appendix F to Attachment 3). Restoring the pre-development hydrologic regime by infiltrating additional runoff that is generated from the creation of new impervious surfaces will protect receiving channels from erosion by preventing larger volumes of flow at higher velocities, and it will help to prevent downstream wetlands from inundation and lakes from other water quality degradation that may occur from increased flows.
65. The purpose of establishing a set of criteria for sizing stormwater management practices in the Permit is to try to mimic the pre-development hydrologic regime, from flood flows to ground water recharge and pollutant loads. This is extremely important when creating new impervious surface near special or impaired waters in order to protect the quality of the water body. Too much runoff sent to a stream will erode its banks causing excessive amounts of sediment to be discharged to the stream. However, a reduction in ground water due to the creation of impervious surface that reduces infiltration, could potentially cause a ground water fed stream to run dry during certain times of the year.
66. The evaluation conducted by the MPCA demonstrates the benefits of the additional BMPs required in Appendix A for Discharges to Special and Impaired Waters. The analysis shows that a great amount of sediment can be discharged from a construction site even during just one rain event. It also shows that suspended particles leaving a construction site can travel many miles. The MPCA’s evaluation of the requirement for additional permanent stormwater management shows the majority of the volume of runoff in any year will be treated when projects are designed to meet this higher standard. Additionally, the required infiltration will work to restore ground water recharge to rates closer to those found before construction. However, the MPCA limited the distance from special or impaired waters where additional BMPs are required for construction sites to one mile.
67. By limiting the distance to one mile for this Permit cycle, the MPCA believes that the Permit provides environmental protection for impaired waters while also providing consistent, state-wide, streamlined BMPs that are practical for Permittees to implement and for the MPCA to administer, review, and approve. This will allow Permittees to easily understand what needs to be done when

additional protection is needed. It also provides Permittees the ability to comply with complicated federal regulations for impaired waters in a straightforward way with clear, easy to follow requirements. This approach will not require a site by site detailed modeling analysis to determine the transport of sediment, which is a possible outcome of setting no distance limit or criterion. The requirements do not apply if runoff from the site actually flows away from the impaired water into another watershed, or if the status of an impaired water changes while a site is under construction. It will provide clear expectations for the Permittee and the inspector and simplify technical assistance and enforcement.

68. Discharges to impaired waters. Waters that are impaired do not meet water quality standards. These standards define how much of a pollutant can be in the water and still allow it to meet its designated uses such as drinking water or aquatic recreation. Once a water is identified as impaired on the USEPA 303(d) Clean Water Act list of impaired waters, a total maximum daily load (TMDL) study must be completed for the impaired water. The TMDL sets a waste load allocation and an allowable quantity of a pollutant from point sources, including discharge of stormwater associated with construction activity. Federal regulations require NPDES permits to be in compliance with TMDL waste load allocations, and to ensure that discharges do not cause or contribute to a violation of a water quality standard in an impaired water for which there is not a USEPA approved TMDL.
69. The MPCA Impaired Waters/TMDL Program typically identifies all pollutant sources within the entire impaired watershed if applicable. The MPCA Stormwater Program has worked with the MPCA TMDL Program to develop an approach where the NPDES/SDS Permit for construction activity includes additional BMPs to meet the requirements of most TMDLs. However, the Permit also allows for the TMDL to prescribe additional BMPs in rare cases where the TMDL establishes a need to do so. This approach contains requirements for additional BMPs within one mile of the impaired water.
70. One mile is consistent with USEPA's use of the one-mile distance in other areas of the stormwater program, such as a) the Phase I industrial operator application requirements (40 CFR §122.26 (c)(1)(i)(B): "...the operator shall provide an estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility)...", and b) the large and medium size municipal separate storm sewer system application requirements (40 CFR § 122.26 (d)(1)(iii)(B)): "Part 1 of the application shall consist of...a USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application."
71. In regard to the one-mile versus 2,000-foot criteria, BATC has not offered any new facts or shown there is a reasonable basis underlying their assertions (e.g. that the one mile is not supported by science) to aid the MPCA in making a decision on the Permit on this issue. The record of evidence shows that construction site discharges exceeding the proposed one-mile criteria will adversely affect downstream waters. Other than mere assertions, BATC failed to provide information to support their assertions and thus failed to provide a reasonable basis with regard to their position on this issue. This is a policy decision for the MPCA to determine the distance that requires additional BMPs because the record of evidence demonstrates that environmental effects from construction site discharges occur well beyond the current 2,000-foot criteria. Sediment transport does contribute to the sediment and other related pollutant loading to downstream waters, including

impaired waters. MPCA has selected the one-mile criteria for reasons stated in this record. For the reasons identified herein and in this record, the MPCA finds that a hearing on this issue will not aid it in addressing this issue and that BATC failed to satisfy the third requirement of Minn. R. 7000.1900, subp. 1.

72. BATC is concerned about anti-backsliding and contends “...this one mile requirement may not be relaxed without concerns of anti-backsliding, even if the environmental benefit is proved not reasonably or (practically) attained.”
73. BATC’s issue regarding anti-backsliding does not qualify as a disputed issue of material fact. The question of whether anti-backsliding regulations apply to the one mile requirement in the future is a question of law, not a question of fact. Under federal law, an NPDES Permit may be renewed, reissued or modified to contain a less stringent effluent limitation. 40 CFR§ 122.44(l)(2)(i). MPCA, as the delegated NPDES permitting authority for the State, has the authority to apply less stringent permit requirements *if* supported by sound science and experience that a different requirement provides an equal amount of environmental protection or that water quality standards will still be met. Therefore, BATC does not raise a disputed issue of material fact, but an issue of legal interpretation. BATC has failed to satisfy the first requirement (e.g. disputed material issue of fact) of Minn. R. 7000.1900, subp. 1.
74. BATC asserts that the one mile distance requirement is a “shotgun” approach to managing construction stormwater and that if the distance required is so great, every project is caught within the requirement. BATC suggests that every 50-acre project within the Twin Cities metropolitan area would require SWPPP review and the review should be limited to projects within 2,000 feet of a special or impaired water.
75. It is a policy issue for the MPCA to determine which SWPPPs the MPCA will review. Part II.B.1.b.a requires a Permit application be submitted at least 30 days before the start of construction activity for projects over 50 acres that have a discharge point on the project that is within one mile of, and flows to, a special or impaired water. This requirement allows time for MPCA review of SWPPPs for projects with a greater potential for environmental impacts due to their size and proximity to special or impaired waters.
76. The MPCA reserves the right under Part V.B to review any SWPPP or other information required by the Permit. The SWPPP review requirements of this Part for projects “within one mile” are consistent with the distance requirement for additional BMPs under Appendix A.B.
77. MPCA disagrees with BATC’s assertion that if the distance required is too great, presumably referring to one mile, every project is required to implement the additional BMPs. MPCA staff mapped all impaired waters in the State and calculated the land surface area that would fall within the one mile distance. Land surface area was calculated using GIS technology with the water bodies listed on the 2006 Clean Water Act Section 303(d) Impaired Waters List with the following sediment related pollutant(s) or stressor(s): phosphorus (nutrient eutrophication biological indicators), turbidity, dissolved oxygen, and biotic impairment (fish bioassessment, aquatic plant bioassessment or aquatic macroinvertebrate bioassessment). The shape files used were from the United States Geological Survey (USGS), National Hydrography Dataset (NHD) for lakes and streams mapped at 24,000 to 1 scale. This USGS NHD is updated on a continuous basis.

78. The MPCA found that statewide, only 14 percent of the State is within this area. For the ten county Twin Cities metropolitan area, 37 percent of the land area is within this area (see response to comment 14.1-7). Therefore, based on this data, the one mile distance would not require every project to implement the additional BMPs as BATC suggests. BATC failed to provide any information or evidence supporting its assertion that every 50-acre project in the Twin Cities metropolitan area would require review under this one-mile provision.
79. BATC does not raise a material issue of fact regarding projects subject to review under the one-mile requirement. This is a policy issue for the MPCA to decide on which projects it will do SWPPP review prior to permit coverage issuance. The MPCA does not believe a hearing will further aid it in addressing this issue because BATC failed to provide any information to support its assertions. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Special Waters and Impaired Waters - Hydraulic Flow Path***

80. BATC requested that the 2,000-foot distance to a special or impaired water be “measured along the center line of the hydraulic flow path” stating that this clarification language “prescriptively directs Permittees to calculate the hydraulic flow path of its discharges and act accordingly.” BATC requested the MPCA insert this language in Part II.B.1.b, Part II.B.3.b, Part III.A.9, and 9.a, Part III.A.9.b, and Part III.A.9.d
81. Determining a distance measurement taken along the hydraulic flow path could require extensive analysis, cost, and time. The hydraulic flow path could be different for different size storm events. The hydraulic flow path could also change direction on a project if overtopping a land feature occurs. If a project discharges into an existing storm sewer, extensive research would be required to determine which direction and path the water flows. This information may not be readily available as many communities do not have records of the exact layout of their storm sewer systems. In such case, detailed survey information would be needed to determine the flow path.
82. The MPCA’s Permit method for determining distance is to measure along a straight line from the discharge point of the project to the ordinary high water level of the receiving water. The MPCA developed an electronic map tool using Geographic Information Systems (GIS) technology to assist regulated parties with determining project distance from a special water. The online map tool makes this determination by making a straight line measurement. The GIS map tool has proven to be a simple, cost effective, and quick way to determine distance. This map tool is available on the MPCA Construction Stormwater Web page at [www.pca.state.mn.us/water/stormwater/stormwater-c.html#specialwaters](http://www.pca.state.mn.us/water/stormwater/stormwater-c.html#specialwaters).
83. BATC has not raised a material issue of fact in dispute but instead proposes an alternative method absent any rationale or information supporting use of their proposed alternative. This is a policy and technical issue for the MPCA to determine. The MPCA can select the method to be used for determining distance measurement to a special or impaired water without resorting to a hearing process. The MPCA finds that a hearing on this issue will not aid it in addressing this issue because BATC failed to provide any information underlying its proposed method. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Special Waters and Impaired Waters - Flows To***

84. BATC requested insertion of the word “directly” after the word “flows” to “make it clear that the intent is to regulate discharges that flow directly to special and impaired waters.” BATC requested the insertion of this language in Part II.B.1.b, Part II.B.3.b, Part III.A.9, and 9.a, Part III.A.9.b, and Part III.A.9.d.
85. The MPCA disagrees with BATC’s assertion that “The phrase “flows to” is so vague that it could result in various interpretations and potential liabilities for the Permittee resulting from occurrences of which the Permittee has no control.” The MPCA believes the language “flows to” is sufficiently clear to make the determination whether a project discharges to a special or impaired water. With nearly five years experience implementing the existing NPDES/SDS General Permit MN R100001, and the Appendix A.B Requirements for Discharges to Special Waters, the MPCA has not encountered problems with implementation of the Appendix A.B requirements, nor has the MPCA received complaints from Permittees regarding their ability to interpret these requirements, specifically the language “flow to.” Accordingly, MPCA’s Permit protects the waters if the discharge flows to it, directly or indirectly.
86. The language “flows to” is more protective of water quality because it accounts for all sediment related pollutants that leave a site and reach a receiving water. The impacts of a given load of sediment related pollutants entering a receiving water do not diminish if the polluted runoff goes through multiple conveyance paths before reaching the receiving water.
87. Use of the word “directly” as BATC suggests, would result in creating a loop hole for Permittees to avoid the requirement for additional BMPs to protect water quality. Potentially, a Permittee could pull a discharge pipe back a foot, or some other distance, from a receiving water and then claim that the project is not “directly” discharging to that receiving water. BATC’s proposal to use the term “directly” creates potential Permit implementation problems if regulated parties attempt to circumvent the Permit requirements by arguing the project site’s discharges only get to waters indirectly. BATC does not make clear how indirectly would be defined, construed and implemented so as to provide the alleged clarity it asserts will follow from its proposal.
88. BATC has not raised a material issue of disputed fact, but an issue of legal interpretation. This is a policy issue for the MPCA on whether to include the language “directly” when referring to the flow of discharges from a project. The MPCA believes that adding the language “directly” would make the Permit less protective of water quality and create the very ambiguities that BATC is allegedly trying to clarify. This is not a material issue of fact, and a hearing will not aid the MPCA further in resolving this issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Special Waters and Impaired Waters - Additional BMPs***

89. BATC requested the MPCA insert new permit language in Part II.B.1.b.i to allow certain sites an exemption from the additional BMPs in Appendix A.C. BATC proposes “A project is exempt from this requirement if it is demonstrated through the universal soil loss equation or other documented method that adding BMPs to a site located more than 2,000 feet from its receiving water has no appreciable effect on the amount of pollutants reaching the waters from that site; except for trout streams that require temperature controls.”



90. This is a policy issue for the MPCA to determine when additional BMPs are needed. The MPCA has chosen to require additional BMPs, in certain circumstances, for added protection of special waters, and when a water is impaired for a sediment related parameter and the sediment load must be reduced. The MPCA staff believes that providing cover on disturbed soils in a quicker timeframe (Appendix A.C.1.a) will have an appreciable positive effect on all sites where this requirement applies. This BMP will result in an approximate 90 percent reduction of sediment runoff, as compared to a slope without cover, during this timeframe (see response to comment 14.1-4).
91. The USLE is only applicable for determining the tons of sediment lost from a construction site over a given period of time. It does not take into account the hydraulic characteristic of the flow path between the site and receiving water, nor does it provide any conclusions of what the impact on the receiving water will be.
92. The MPCA does not believe that BATC's proposed request can result in an exemption due to the fact that additional technical analysis would be needed to determine the effect on the receiving water. To determine if runoff from a site would have an "appreciable effect" on a receiving water, complex models would be required in addition to the USLE. This determination would be extremely complex, time consuming, and costly for Permittees. Additionally, BATC's proposal inserts vagueness and ambiguity because it does not define "appreciable effect."
93. BATC does not raise a material issue of fact in regard to their proposed exemption. The matter of when additional BMPs are needed to protect water quality is a policy issue for the MPCA to decide. The MPCA does not believe a hearing will further aid it in addressing this issue because BATC failed to provide information or any new facts on its proposal demonstrating there is a reasonable basis underlying their issue to aid MPCA in making a decision on this issue for the Permit. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

#### ***Termination of Permit Coverage***

94. BATC Comment No. 4. BATC requested that the MPCA allow Permittees to terminate permit coverage when construction activity has ceased. BATC's suggestion to address this issue was to include language from the *New York State SPDES General Permit for Construction Activity, GP-0-08-001, Page 17, (October 2007)*. BATC requests the insertion of a new Part II.C.2.d "Planned shutdown with partial project completion." which would allow construction sites sitting idle to terminate permit coverage if all exposed soils were stabilized with vegetation.
95. This a policy issue for the MPCA to determine whether permit coverage can be terminated when construction activity has ceased on a portion of a site. When permit coverage may be terminated is also a question of law and is addressed in federal regulations for NPDES general permits for construction activity [*Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities*, 63 Fed. Reg. 7904, 1998].
96. The Permit requires Permittees that want to terminate permit coverage to submit a NOT. The Permit meets the federal requirements for terminating permit coverage.

97. The MPCA policy since the 2003 issuance of the existing NPDES/SDS General Permit No. MN R100001 is to not terminate permit coverage on projects that are not complete but are stabilized with no ongoing construction activity. The MPCA finds this policy is necessary because if permit coverage is terminated: 1) there is no Permittee responsible for final cleanout/maintenance of stormwater treatment systems after construction resumes on individual lots, 2) the requirement for the developer to forward the SWPPP to the builder is not met, and 3) a new permit would be required prior to any construction activity. If lots were sold individually after coverage is terminated under the original permit, additional permits (potentially hundreds on a large scale development) would need to be obtained, with a permit application fee of \$400 for each site.
98. The MPCA acknowledges that the construction industry has been negatively affected by current conditions in the homebuilding market, and as a result, developers are more often left with vacant lots awaiting construction.
99. The approach proposed by BATC would require only permanent treatment to be installed for what was constructed rather than what was planned to be constructed. This approach could potentially leave the Permittee of each individual lot to determine how to meet the permanent treatment requirements. MPCA staff believes this would create undue hardship for many individual builders who may not have experience in designing and implementing permanent stormwater management systems.
100. As an alternative, the MPCA, with input from BATC and other stakeholders, developed new permit language to address the issues (see Finding 12) regarding termination of permit coverage on projects that are not complete. Part IV.G.6 provides flexibility for a Permittee to terminate permit coverage prior to completion of all construction activity if construction activity has ceased for at least 90 days, at least 90 percent of the originally proposed project is complete, and permanent cover has been established on areas where construction activity is not complete. MPCA staff believes that if the construction site is close to complete, these issues, for the most part, are eliminated.
101. At BATC's request, to provide flexibility and reduce costs for the Permittee, the MPCA revised Part IV.E.3 to allow for suspension of inspection requirements for sites where no construction activity is occurring and permanent cover has been established on all exposed soils.
102. The draft Permit provides flexibility for terminating permit coverage when construction activity has ceased. MPCA staff believe that with the new Part IV.G.6, permit coverage can be maintained by a Permittee without causing additional hardship. Properly vegetated sites should not be a concern for the Permittee. Inspections are no longer required, and when a site is sold, coverage can be transferred to the new Permittee at no cost. Permit coverage can be transferred on sites comprised of multiple parcels to multiple new Permittees with no permit application cost.
103. The issue of when Permit coverage can be terminated is not a material issue of fact. This is a policy and legal issue for the MPCA to determine what Permit requirements must be met before a Permittee can terminate permit coverage. The MPCA does not believe a hearing will further aid it in addressing this issue because BATC failed to provide any information showing a hearing would aid the MPCA on this issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Discharges to Impaired Waters and TMDLs***

104. BATC Comment No. 11. BATC requested the MPCA insert the language “Where there is a USEPA approved TMDL that does not establish a waste load allocation (WLA) applicable to construction stormwater discharges, adherence to a SWPPP that meets the requirements of this permit will be assumed to be consistent with the approved TMDL” in Part III.A.9.b after the last sentence. The BATC’s additional proposed text merely restates the draft Permit language in this part and does not provide further clarification of the intent of Part III.A.9.b. Therefore, this addition is redundant.
105. In BATC’s May 9, 2008, meeting with MPCA, BATC requested that the intent of Part III.A.9.b be addressed in the MPCA’s response to comments in order to provide in the administrative record for this Permit, the MPCA’s intended policy on impaired waters without an approved TMDL or with an approved TMDL and no WLA.
106. The MPCA’s response to BATC’s request is provided for in MPCA response to comment 14-11, therefore, a hearing will not aid the MPCA further on this matter. Additionally, the BATC text proposal is not a disputed fact issue but a legal interpretation and policy issue. MPCA decides what permit text is necessary to provide clarity. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1. on this issue of legal interpretation.

***Erosion Prevention Practices***

107. BATC Comment No. 16. BATC requested that the MPCA insert the language “discharge flowing directly to receiving waters” after “areas” in the first sentence of Part IV.B.2: “All exposed soil areas must be stabilized as soon as possible to limit soil erosion but in no case later than 14 days after the construction activity in that portion of the site has temporarily or permanently ceased.” BATC does not include any rationale for this additional language.
108. The insertion of the additional language could make the Permit less enforceable. There are some rainstorm events that would cause runoff in only one direction from a site, while a larger rainstorm event might overtop low ridges or undulations on site and runoff in a different direction. In such a situation, requiring an inspector or Permittee to make the determination on what part of a site flows where, under all possible storm events, would often times be an impossible judgment call, and likely result in inconsistencies in such determinations.
109. BATC has not raised a material issue of fact in dispute but instead proposes additional Permit language, minus any rationale or underlying information for their request. Whether or not the MPCA should include the additional language is a policy issue. MPCA staff does not believe that the additional language helps to make the Permit more clear. The MPCA finds that a hearing on this issue will not aid it in addressing this issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Inspections and Maintenance***

110. The draft Permit Part IV.E.4 contains a requirement that all nonfunctional BMPs must be repaired, replaced, or supplemented with functional BMPs within 24 hours after discovery, or as soon as field conditions allow access unless another timeframe is specified in the Permit.

111. BATC Comment No. 19. BATC requested that “within 24 hours after discovery” be stricken from the Permit and language added “as is appropriate for the specific BMP.” BATC disagrees that all unnamed and, in many cases, less essential BMPs, should not be subject to a stricter schedule because many Permittees have weekly maintenance contracts for inspection, repair, replacement or supplement of BMPs, and that 24 hours are not cost effective or reasonable with these existing contracts.
112. The MPCA believes the existing permit language is necessary to protect water quality. The “24 hours”, or “as field conditions allow” are appropriate timeframes for maintenance of most BMPs that are discovered to be nonfunctional due to the frequency and amount of rainfall that occurs in Minnesota. On average, it rains approximately once every three days in the State, according to rainfall frequency data extracted from "Methodology for Analysis of Detention Basins for Control of Urban Runoff Quality" prepared for Office of Water Nonpoint Source Division US EPA, Washington DC, Project Officer D.N. Athayde, Sept. 1986 (the return frequency used is for Minneapolis and is calculated at 74 hours (3.08 days)). Waiting for a weekly scheduled maintenance if the problem was discovered with six days until the next scheduled maintenance can result in increased discharges from a site.
113. The MPCA acknowledges that there are certain BMPs that require additional time to maintain or repair. Part IV.4.b. and c. provides for less stringent timeframes for clean out of temporary and permanent sediment basins, within 72 hours of discovery when the depth of sediment collected in the basin reaches one-half the storage volume; and removal of sediment in surface waters, within seven days of discovery unless precluded by legal, regulatory or physical access constraints.
114. The issue of what timeframes should be required for inspection and maintenance of BMPs is not a material issue of fact. This is a technical and policy issue for the MPCA in terms of determining what inspection and maintenance frequency is appropriate for BMPs required under this permit. The MPCA does not believe a hearing will further aid it in addressing this issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.
115. BATC Comment No. 20. BATC requested that the Permit require third party and government inspectors be required to have training with regard to the activities enforced under this Permit. BATC asserts that as a matter of equity, inspectors should be required to have the same or better training required of Permittees.
116. BATC does not raise a material issue of fact because the MPCA agrees that inspectors should be qualified and trained in order to correctly and consistently enforce the terms and conditions of the Permit. The MPCA is committed to training its inspectors in erosion prevention and sediment control, inspections, and compliance with the Permit. The MPCA’s Memorandum of Understanding with MNDOT requires that all MPCA inspectors be trained through the same erosion prevention and sediment control training program as MNDOT’s contractors. This training is required of the MPCA Joint Powers Agreement (JPA) partners.
117. Permittees who meet the application requirements are authorized to discharge stormwater from construction sites under the terms and conditions of the Permit. The requirement that BATC requests would not apply to any government inspector since the MPCA and its inspection partners, through a JPA, do not apply for Permit coverage or sign the Permit application; and therefore, are not bound by the terms and conditions of the Permit.

118. The MPCA has no control over the use of the MPCA's inspection report and corrective actions form by non-MPCA inspectors. Though Federal law prohibits the delegation of NPDES authority to the local level, local governments and other entities are not precluded from using MPCA's forms for inspection purposes.
119. The NPDES/SDS General Permit for Municipal Separate Storm Sewer Systems (MS4s) contains requirements for construction and post construction stormwater management. BATC requests that municipalities covered under the MS4 General Permit have training in enforcement of the construction related minimum control measures required under that Permit as well as the requirements of this Permit. BATC's issues with the MS4 General Permit must be addressed through that permit and public notice process.
120. This is a policy issue for the MPCA to determine the appropriate training requirements for its staff and inspection partners and under what regulatory scheme, if any, will be used to impose any such training requirements. This is not a material issue of fact and a hearing will not aid the MPCA in addressing this issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Concrete Washout Areas***

121. BATC Comment No. 21. BATC requested that concrete washout up to a minimum threshold of 100 cumulative gallons should not require a liner or containment facility and proposes a discharge threshold "as a matter of practicality for the small concrete contractor whose potential impacts are negligible."
122. Concrete washout areas are designated areas used to contain solid and liquids when the chutes of concrete mixers and hoppers of concrete pumps are rinsed out after delivery. Containing concrete washout in a liner or above ground containment facility consolidates solids for easier disposal and prevents runoff of liquids. Solids that are improperly disposed of can clog storm drain pipes and cause flooding.
123. Allowing a minimum threshold level without containment does not adequately protect surface water and ground water. Concrete washout or wash water is alkaline, often times with a pH > 12, and contains high levels of chromium, which can leach into the ground and contaminate soils and potentially ground water. It can also migrate to a storm ditch, which can increase the pH of area waters and harm aquatic life. Requiring an impermeable liner, an engineered clay liner, or above ground leak proof containment facility will prevent infiltration of the concrete wash water and protect ground water as well as surface waters.
124. This is a policy issue for the MPCA, an issue related to the threshold for any proposed exemption. Concrete washout quantities of less than the proposed 100-gallon threshold can be easily managed in a proper containment facility on site. MPCA staff believes that soils, ground water, and surface water can be protected from all concrete washout wastes using low cost BMPs for any size job. Installing concrete washout facilities not only prevents pollution but also is a matter of good housekeeping at a construction site.

125. BATC has not raised a material issue of fact in dispute but instead proposes a minimum threshold level without containment. The issue of whether or not a threshold level should be applied to the requirement for concrete washout is a policy issue, not a disputed material fact issue. The MPCA does not believe a hearing will further aid it in addressing this issue because BATC failed to provide any information or new facts to show there is a reasonable basis underlying their issue to aid the MPCA in making a Permit decision on this issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Whether the draft permit's limitations on transferability, termination, and continuing liability are justified***

126. The next issue in BATC's contested case request has to do with change of permit coverage and continuing liability under an open permit. BATC asserts that the "MPCA must issue a permit that allows Permittees to exit a permit when construction activity has ceased, " and "open permits expose Permittees to civil and criminal liabilities even when they are no longer engaging in activities that cause stormwater-related concerns." BATC seeks specific relief and requests that the following additional language be inserted in Part II.C.2: "d. Planned shutdown with partial project completion. All soil disturbance activities have ceased; and all areas disturbed as of the project shutdown date have achieved final stabilization; and all temporary structural erosion and sediment control measures have been removed; and all post construction stormwater management practices required for the completed portion of the project have been constructed in conformance with the SWPPP are operational."
127. BATC's issue does not qualify as a disputed issue of material fact. Whether permit coverage can be terminated when construction activity has ceased is a question of policy; not a disputed issue of material fact. When permit coverage may be terminated is also a question of law and is addressed in federal regulations for NPDES general permits for construction activity [*Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities*, 63 Fed. Reg. 7904, 1998].
128. The Permit meets the federal requirements for terminating permit coverage [*Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities*, 63 Fed. Reg. 7904, 1998].
129. The draft Permit provides flexibility for terminating permit coverage when construction activity has ceased. The MPCA, with input from BATC and other stakeholders, included additional permit language to address termination of permit coverage on a partially complete project. Part IV.G.6 provides flexibility for a Permittee to terminate permit coverage prior to completion of all construction activity if construction activity has ceased for at least 90 days, at least 90 percent of the originally proposed project is complete, and permanent cover has been established on areas where construction activity is not complete.
130. The MPCA disagrees with BATC's assertion of continuing liability. Part II.C.1 provides "The Permittee(s) coverage under this permit terminates at midnight on the postmark date of the NOT, or on the date an online NOT is submitted to the MPCA".

131. Severability of liability is provided for in Part V.E. “The Permittee(s) are not liable for permit requirements for activities occurring on those portions of a site where another part has submitted a subdivision short form registration...or a NOT has been issued by the MPCA...” The MPCA believes the permit is clear about the termination of liability and the Permittee is not subject to continuing liability.
132. As noted above, BATC’s contested case request raises policy and legal issues; not fact issues. Holding a contested case hearing would not aid the MPCA in resolving the issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Whether the proposed revisions offered by BATC are necessary to make the draft permit more reasonable***

133. The next issue in BATC’s contested case request is whether the proposed revisions offered by BATC are necessary to make the Permit more reasonable. The MPCA reviewed and considered all comments received, including BATC’s comments, and made revisions to the draft NPDES/SDS Permit to provide flexibility and clarification of requirements in several terms and conditions of this Permit.
134. The MPCA has accepted many of BATC’s proposed revisions, and the Permit was changed as requested by BATC, as addressed in Findings 30-46.
135. The MPCA finds that not all proposed revisions as requested by BATC are necessary to make the permit more reasonable, as addressed in Findings 55-125.
136. BATC does not raise a disputed material issue of fact with this issue but merely a difference of interpretation. BATC merely raises the question of whether the proposed revisions will make the permit more reasonable. These are policy, legal, and technical issues for the MPCA to decide as addressed in these Findings. As a result, holding a contested case hearing will not aid the MPCA in resolving the issue. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Whether the benefits of the draft permit provisions are justified in light of the costs they will impose***

137. The next issue in BATC’s contested case request is whether the benefits of the draft Permit are justified by the costs of the Permit. BATC is vague on this issue and did not identify which costs they are referring to, and did not provide any information or new facts to support its allegations. The MPCA acknowledges that certain of BATC’s other more specific comments do reflect a concern with costs. One example is the cost of additional BMPs in Appendix A in their comment (No. 1) on Part II.B.1.b where BATC suggests that the “MPCA provide Permittees with an option for certain sites to be relieved from the heightened BMP requirements,” or BATC could mean the cost of inspection and maintenance requirements in their comment (No. 19) on Part IV.E.4 where BATC states “It is not cost effective, nor is it reasonable, for the MPCA to require a mandatory 24-hour turn around on all non-specified BMPs.” These are policy issues MPCA has addressed in Findings 89-93, and Findings 110-114.

138. The broader question of whether the benefits of the draft Permit are justified in light of the costs the Permit will impose is a question of policy; not a disputed issue of material fact. The MPCA is required, as the delegated NPDES authority, to implement this program addressing stormwater discharges associated with construction activities. Failure to implement the program could result in a loss of federal funds for construction activity (e.g. federal highway program) in Minnesota, and could ultimately result in a loss of MPCA's NPDES program delegation and state control of all Minnesota NPDES water permits (wastewater, industrial, feedlots, etc.) to the federal government.
139. The MPCA agrees with the environmental assessment conducted by USEPA that determined the effect of the Phase II stormwater rule, including regulating small construction activity, will have minimal impacts on the economy or employment (see *Federal Register* dated December 8, 1999, page 68729).
140. The MPCA believes that the environmental benefits of implementing this permit and protecting water quality outweigh the costs.
141. BATC has not raised a material issue of fact in dispute. BATC has failed to provide information or new facts to support its allegations or assertions. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Whether the proposed regulations are feasible***

142. Another issue that BATC proposed to present at a contested case hearing was whether the proposed regulations are feasible. Again, BATC is vague and does not specify if they are referring to the feasibility of the entire Permit or only specific parts of the Permit. Whether the Permit is feasible is a matter of interpretation, not a disputed material issue of fact.
143. This is a policy issue for the MPCA to determine. The MPCA has nearly 15 years and three permit cycles of experience regulating stormwater discharges associated with construction activity, and based on this experience finds the existing NPDES/SDS Permit to be feasible.
144. MPCA staff, with input from stakeholders, identified issues needing revision and/or clarification in this Permit reissuance. The MPCA made revisions to the Permit based on stakeholder input provided both during the Permit revision process and during the public notice comment period in the form of written correspondence submitted to the MPCA. The public involvement process greatly assisted the MPCA in development of the Permit. The Permit is feasible for the MPCA to implement, for Permittees to implement and comply with, and it is protective of water quality. Through the public involvement process and subsequent revisions to the draft Permit, the MPCA has made a determination that the NPDES/SDS Permit is feasible.
145. The MPCA will make revisions to this Permit, in the next permit reissuance cycle or sooner if necessary, should the MPCA make a determination based on implementation of this Permit that specific provisions of the Permit are not feasible to implement.
146. If there is a proposed construction project so unique that coverage under this NPDES/SDS Permit is infeasible, then the project proposer can apply for and the MPCA can issue an individual NPDES/SDS stormwater construction permit for that project.



147. For the reasons discussed, BATC did not raise a disputed material fact regarding the feasibility of the Permit, and the MPCA finds that holding a hearing on this issue would not aid it further. BATC failed to provide information or new facts underlying its assertions so there is no reasonable basis for holding a hearing. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

***Whether the draft permit needs further flexibility to prevent it from being arbitrary***

148. Again BATC is vague on this issue and does not identify where in the draft Permit they are referring to that may need further flexibility. In their comment (No. 1) on the one-mile distance for special and impaired waters, BATC does state “The expanded distance is not supported by science, it is arbitrary, it is overly broad and vague...”
149. The MPCA does not believe the Permit to be arbitrary. BATC’s assertions to the contrary are merely legal issues and ones of interpretation, not disputed material issues of fact.
150. The Permit was revised through a stakeholder input process.
151. The one-mile distance is based on scientific data as provided in the response to comments and addressed in Findings 55-79.
152. The MPCA has made changes to the Permit based on comments received, from BATC and other commenters, that the MPCA believes will provide additional flexibilities for Permittees in meeting Permit requirements.
153. As noted in Finding 134, the MPCA has accepted many of BATC’s proposed revisions, and changes to the Permit were made as requested by BATC.
154. BATC has not raised a material issue of fact in dispute. In addition, BATC failed to provide information or new facts providing a reasonable basis for a hearing. BATC has failed to meet the first and third requirements of Minn. R. 7000.1900, subp. 1.

**F. Issuance of the Permit**

155. The MPCA's decision to issue the Permit is governed by its permit rule, Minn. R. 7001.0140, which provides:

*Subpart 1. Agency action. Except as provided in subpart 2, the agency shall issue, reissue, revoke and reissue, or modify a permit if the agency determines that the proposed permittee or permittees will, with respect to the facility or activity to be permitted, comply or will undertake a schedule of compliance to achieve compliance with all applicable state and federal pollution control statutes and rules administered by the agency, and conditions of the Permit and that all applicable requirements of chapter 116D and the rules adopted under chapter 116D have been fulfilled.*

156. The MPCA finds that the Permit meets the requirements of Minn. R. 7001.0140. Compliance with the requirements of the Permit, and implementation of BMPs contained therein, will achieve greater environmental protection from regulated entities. The Permit is in compliance with all applicable state and federal pollution control statutes and rules. The conditions of the Permit will not pose a danger to human health or the environment. There are no environmental review requirements pursuant to Minn. Stat. ch. 116D that are required prior to issuance of the general Permit.
157. These Findings, Conclusions of Law and Order, the MPCA Board Item and its various attachments constitute the report required by Minn. R. 7001.0125 and adequately fulfill the requirements of that rule.


## **II. CONCLUSIONS OF LAW**

1. The MPCA has jurisdiction to issue this Permit and to rule on the BATC contested case request.
2. Adequate and timely public notice of the proposed NPDES/SDS Permit reissuance was given in accordance with Minn. R. 7001.0100, subs. 4 and 5.
3. The criteria of Minn. R. 7000.0190, subp. 1, for granting contested case hearing requests have not been met with respect to the issues raised in the request for a contested case hearing by the Builders Association of the Twin Cities. Many of the issues raised by BATC were resolved with revisions to the Permit by the MPCA as previously identified in the Findings and this record. This contested case hearing request on the remaining BATC issues should be denied.
4. The requirements of Minn. R. 7001.0140 for reissuance of this NPDES/SDS Permit have been met and for the reasons stated in these Findings and Conclusions, the NPDES/SDS General Permit No. MN R100001 should be issued.
5. Proper implementation of the pollution control measures in this NPDES/SDS Permit will achieve compliance with all applicable state and federal pollution control statutes and rules and the conditions of the Permit.
6. Implementation of the requirements of this Permit will achieve greater environmental protection from regulated entities.
7. Any finding more properly considered a conclusion shall be considered a conclusion. Any conclusion more properly considered a finding shall be considered a finding.

### III. ORDER

1. The Minnesota Pollution Control Agency determines that the remaining issues raised by Builders Association of the Twin Cities do not meet the requirements under Minn. R. 7000.0190, subp. 1 for granting a contested case hearing. The Minnesota Pollution Control Agency denies the request by the Builders Association of the Twin Cities for a contested case hearing.
2. The Minnesota Pollution Control Agency authorizes reissuance of the National Pollutant Discharge Elimination System/State Disposal System General Permit No. MN R100001 for Stormwater Associated with Construction Activity.

### IT IS SO ORDERED



Commissioner Brad Moore  
Chair, Citizens' Board  
Minnesota Pollution Control Agency

7/27/08

Date