

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-2091

Caption [use short title]

Motion for: Joint Motion to Hold Consolidated
Cases in Abeyance Pending Respondent's
Performance Under Settlement Agreement

Waterkeeper Alliance, Inc., et al. v. U.S. EPA

Set forth below precise, complete statement of relief sought:

Order holding case in complete abeyance
until such time as U.S. EPA has fulfilled its
obligations under the settlement agreement.

MOVING PARTY: Waterkeeper Alliance (Joint Motion)

OPPOSING PARTY: U.S. EPA

☐ Plaintiff

☐ Defendant

☒ Appellant/Petitioner

☒ Appellee/Respondent

MOVING ATTORNEY: Edan Rotenberg

OPPOSING ATTORNEY: Martin F. McDermott

[name of attorney, with firm, address, phone number and e-mail]

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US DOJ

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202-514-4122; martin.mcdermott@usdoj.gov

Court-Judge/Agency appealed from: U.S. EPA

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes ☐ No (explain):

Opposing counsel's position on motion:

☒ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☒ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes ☒ No

Has this relief been previously sought in this Court?

☐ Yes ☒ No

Requested return date and explanation of emergency:

not an emergency

Is oral argument on motion requested?

☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date:

Signature of Moving Attorney:

s/ Edan Rotenberg

Date: 8/23/16

Service by: ☒ CM/ECF

☐ Other [Attach proof of service]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

WATERKEEPER ALLIANCE, INC., *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

FEDERAL WATER QUALITY COALITION,
et al.,

Intervenors-Respondents.

Docket No. 15-2091(L)
15-2259 (CON)
15-2428 (CON)
15-3315 (CON)

**JOINT MOTION TO HOLD CONSOLIDATED CASES IN
ABEYANCE PENDING RESPONDENT'S PERFORMANCE UNDER
SETTLEMENT AGREEMENT**

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27, the parties jointly move to hold this proceeding in abeyance, in accordance with the Settlement Agreement executed by the parties on August 16, 2016. *See* Exhibit A, attached hereto. The Settlement Agreement provides that the United States Environmental Protection Agency ("EPA") will take certain future actions. The parties agreed in Section XII of the Settlement Agreement to file a joint motion to

hold this proceeding in abeyance until the Settlement Agreement is terminated, at which point the parties will, in accordance with Section XIII of the Settlement Agreement, jointly move to dismiss the proceeding, with prejudice, or Petitioners will move to reactivate the proceeding.



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(con)]*



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A handwritten signature in black ink, reading "Martin F. McDermott", is positioned above a horizontal line.

Martin F. McDermott
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Counsel for Respondent EPA

Dated: August ____, 2016



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*Counsel for Intervenors Respondents
Federal Water Quality Coalition and
Federal StormWater Association*

Dated: August 23, 2016

Exhibit A

SETTLEMENT AGREEMENT

This Settlement Agreement (or “Agreement”) is entered into by and among Waterkeeper Alliance, Apalachicola Riverkeeper, Galveston Baykeeper, Raritan Baykeeper, Inc. d/b/a NY/NJ Baykeeper, Snake River Waterkeeper, Ecological Rights Foundation, Our Children’s Earth Foundation, Puget Soundkeeper Alliance, Lake Pend Oreille Waterkeeper, and Conservation Law Foundation (collectively, “Petitioners”); the United States Environmental Protection Agency (“EPA” or “the Agency”); and Federal Water Quality Coalition and Federal Storm Water Association (collectively, “Intervenors”).

WHEREAS, on June 16, 2015, EPA published in the Federal Register a notice that it issued 44 general permits entitled “National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity” (“MSGP”), 80 Fed. Reg. 34,403 (June 16, 2015), under Clean Water Act § 402(a). For the purposes of this document, these general permits are collectively referred to as the MSGP;

WHEREAS, Petitioners timely filed petitions for review of the MSGP, which were consolidated in the United States Court of Appeals for the Second Circuit, Case Nos. 15-2091 (L), 15-2259 (CON), 15-2428 (CON) and 15-3315 (CON) (collectively, “the MSGP Litigation”);

WHEREAS, Federal Water Quality Coalition and Federal Storm Water Association intervened in the case as respondents on August 4, 2015;

WHEREAS, before any briefs were filed in the MSGP Litigation, the parties entered into settlement discussions under the auspices of the Second Circuit’s Civil Appeals Mediation Program;

WHEREAS, Petitioners, EPA and Intervenors (collectively, the “Parties”) wish to resolve Petitioners’ challenges to the MSGP without litigation;

WHEREAS, upon the MSGP's expiration, EPA intends to issue a new general permit (the "Next MSGP") to generally authorize the types of discharges currently authorized by the current MSGP;

WHEREAS, nothing in this Agreement is intended to affect the terms and conditions of the current MSGP, including its expiration date;

NOW, THEREFORE, without admission of any issue of fact or law, or waiver of any claim or defense except to the extent (if any) provided below, the Parties agree as follows:

I. GENERAL TERMS

The parties to this Agreement are those entities defined above as Petitioners, EPA and Intervenors, and collectively as the "Parties." This Agreement applies to, is binding upon, and inures to the benefit of the Parties, and their successors, assigns, and designees.

This Agreement becomes effective on the date (the "Effective Date") that a fully executed copy of the Agreement is delivered by EPA to Petitioners. Such delivery shall be accomplished by sending such executed copy to Petitioners by electronic transmission promptly upon final execution of the Agreement by the United States.

II. EPA MILESTONES

Subject to any conditions or limitations specified in this Agreement, EPA agrees to obtain final signatures of appropriate EPA officials on a "proposed" or "draft" Next MSGP ("Proposed Next MSGP") by September 1, 2019, or nine (9) months after the National Research Council (NRC) issues its final report (the "NRC Study," as defined below), whichever is later, but in any event not after September 1, 2020. After signature, EPA agrees to promptly submit notice of the Proposed Next MSGP to the Office of the Federal Register for publication.

Subject to any conditions or limitations specified in this Agreement, EPA agrees to take final action (*i.e.*, obtain final signatures of appropriate EPA officials) on the Next MSGP within nine (9) months of signing the Proposed Next MSGP, and promptly submit notice of the Next MSGP to the Office of the Federal Register for publication.

III. NATIONAL RESEARCH COUNCIL STUDY

General Provisions. To assist in informing EPA's consideration of certain issues (defined below as the "Study Issues") pertinent to the Next MSGP, EPA agrees to sponsor and fund -- at a cost not to exceed Two Hundred Fifty Thousand Dollars (\$250,000) -- a study that would be conducted by the National Academies of Sciences, Engineering and Medicine's (the "Academies") NRC, subject to the Academies' and NRC's agreement to undertake the study (the "NRC Study").

The Parties understand that any NRC study, report, work plan or budget must be approved in advance by the Executive Committee of the NRC's Governing Board. The Parties further understand that before the NRC Study's committee selection process begins in this instance, the Academies' staff and board members will work with EPA (as the Study's "sponsor") to determine the specific set of questions to be addressed by the NRC Study in a formal "statement of task" (hereinafter, the "Study Charge"), as well as the duration and cost of the proposed Study. EPA agrees to provide the Academies with a copy of this Agreement, which enumerates below the matters that will inform the Study Charge. In the event the Academies request additional information from EPA regarding development of the Study Charge, EPA agrees to afford Petitioners and Intervenors a reasonable opportunity to supply EPA with input for its response to the Academies' request.

The Parties further understand that Academies staff will solicit suggestions for potential committee members from a wide range of sources before recommending a slate of nominees, who are subsequently reviewed at several levels within the Academies before being submitted as a provisional slate for approval by the Academies president (who is also the chair of the NRC). The provisional list will be posted for public comment before being formally approved. EPA agrees to cooperate with Petitioners and Intervenors so that all Parties have a reasonable opportunity to submit the names of potential committee members of the Study panel, which the Parties expect will include representatives from both the environmental and the regulated communities, as well as others who are familiar with control of stormwater discharges associated with industrial activity under the Clean Water Act and regulations. Petitioners and Intervenors understand that the Academies, not EPA, have final control over the committee selection process.

The Parties understand that in conducting studies, the Academies solicit information from individuals or entities that have been directly involved in or have special knowledge of the problem under consideration, and conduct information-gathering meetings that are open to the public. Written materials provided to a committee by non-Academies persons or entities are maintained in a public access file that will be available for public examination. Once the Study Charge and budget are finalized, an external sponsor such as EPA does not control the conduct of the Study.

EPA agrees to take reasonable measures to enhance the likelihood that the NRC Study will conclude within approximately twenty-four (24) months after the Effective Date, but the Parties recognize that a completion date for the Study is outside of EPA's control.

The NRC Study Issues.

The issues below pertain to technical questions related to the regulation of stormwater associated with industrial activity under the CWA and implementing regulations, specifically CWA section 402(p)(3)(A) and 40 CFR 122.26(b)(14), and EPA's MSGP.

Issue 1. EPA will propose for inclusion within the scope of the NRC Study Charge issues centering on "benchmark monitoring." Specifically, EPA agrees to ask the NRC to review existing literature and the MSGP's current benchmark monitoring requirements, and evaluate whether there are any improvements to benchmark monitoring to allow EPA to more accurately evaluate the performance of industrial activity-related stormwater control measures [SCMs]. If so, EPA will request that the NRC suggest such improvements, which EPA would consider when developing, in the Next Proposed MSGP, effluent limitations that reflect the best available technology economically achievable ("BAT") or the best conventional technology ("BCT"), as appropriate, and that ensure permitted discharges are controlled as necessary to meet water quality standards.

EPA also agrees to propose for inclusion in the NRC study that the NRC evaluate whether current benchmark monitoring reflects good performance of industrial activity-related stormwater control measures [SCMs] by considering the extent to which changes in the current MSGP monitoring regime listed below may promote more effective industrial stormwater management: (a) monitoring by additional sectors not currently subject to such monitoring; (b) monitoring for additional industrial activity-related pollutants; (c) adjusting the benchmark thresholds; (d) adjusting the frequency of monitoring; and (e) any new methodologies or technologies that make industrial stormwater discharge monitoring more effective (as it relates to the MSGP's stated objective of providing a tool for industrial stormwater control measure [SCM] assessment), less burdensome, and/or less costly.

In addition, EPA agrees to propose for inclusion in the NRC study that the NRC consider with respect to (a) technology-based effluent limitations, which parameters are the most important in indicating whether SCMs are operating effectively; and (b) water quality-based effluent limitations, whether any changes to benchmark monitoring requirements may more accurately reflect the existence (or the lack) of water quality impairment in nearby receiving waters, which EPA would consider when developing, in the Next Proposed MSGP, effluent limitations that reflect BAT or BCT, as appropriate, and that ensure permitted discharges are controlled as necessary to meet water quality standards.

Issue 2. EPA will propose for inclusion within the scope of the NRC Study Charge that the NRC evaluate the feasibility of numeric retention standards (*e.g.*, volumetric control standards for a percent storm size or based on percentage of imperviousness) for industrial stormwater dischargers, or specific sectors of industrial stormwater dischargers, as appropriate, and make recommendations regarding the availability of data and the appropriate statistical methods for establishing such standards as both technology-based and water quality-based numeric effluent limitations. EPA will also propose for inclusion within the scope of the Study Charge that the NRC (a) assess whether such retention standards provide an effective and scientifically defensible approach for establishing objective and transparent effluent limitations; (b) assess the merits and faults of retention versus discharge treatment technologies (*e.g.*, sand filters, adsorbents); and (c) consider any risk of contamination to ground water or surface waters from retained stormwater associated with industrial activity and take any such risk into account when making any recommendations.

Issue 3. EPA will propose for inclusion within the scope of the NRC Study Charge that the NRC consider building on its previous (2009) recommendations for industrial stormwater to

identify the highest priority industrial facilities or subsectors for consideration of additional discharge characterization and/or monitoring. By the term “highest priority,” EPA means the facilities/subsectors for which the development of numeric effluent limitations or reasonably uniform or standardized SCMs would be most technically and scientifically defensible, based upon sampling data, data gaps and the likelihood of filling them, statistical issues such as the variability that exists at well-operated sites, and data quantity and quality issues that may impede the calculation of numeric limitations. The NRC shall provide recommendations on monitoring requirements to apply in different permitting scenarios or settings (*e.g.*, impaired waters, antidegradation Tier 3 or Tier 2.5 high quality waters, high background pollutant areas, dense industrial land use areas, and high impervious surface areas).

If the NRC identifies technical or scientific barriers to developing numeric effluent limitations or reasonably uniform or standardized SCMs, the NRC should consider proposing a way to develop the data necessary to establish such numeric effluent limits or reasonably uniform or standardized SCMs within the highest priority sectors, and estimate the cost (to EPA and/or to dischargers) of obtaining such data.

Also, EPA will propose that the NRC assess, specify, and scientifically or technically justify any recommended alterations to the MSGP’s current SCM-based approach when the facility discharges to a receiving water (a) listed as impaired for one or more pollutants characteristically discharged by the sector in its stormwater, and/or (b) serving as critical habitat for one or more federally threatened or endangered species. EPA will propose that, in analyzing these issues, the NRC consider (among other sources) the International Stormwater BMP [best management practice] Database, additional peer-reviewed research results, and certifications issued by independent BMP assessment programs.

Study Completion. If the NRC Study has not been completed within twenty-four (24) months of the Effective Date, EPA will provide Petitioners and Intervenors with a summary of any information it has regarding the Study's progress. Thereafter, Petitioners may invoke their rights under the dispute resolution provisions of this Agreement in Paragraph XV by providing written notice and a request for negotiations with the other Parties. Completion of the delayed Study that precipitated invocation of the dispute resolution process during the pendency of that process shall constitute resolution of the dispute. For purposes of this Paragraph, the NRC Study will be considered "completed" when the NRC (or the Academies) release the Study to EPA and the public in final form. Any alleged inadequacy of the NRC study will not be a basis for a claim that EPA did not fulfill EPA's responsibilities under this Agreement.

IV. FUTURE EPA COMMITMENTS RELATED TO THE NRC STUDY

EPA agrees that, when drafting the Proposed Next MSGP, it will consider all recommendations suggested in the completed NRC Study. In addition, if the completed NRC Study makes recommendations regarding the sectors/subsectors, frequency, parameters, and/or parameter levels in the current MSGP's benchmark monitoring provisions, EPA will -- in the Proposed Next MSGP -- solicit comment on such recommendations.

V. COMPARATIVE ANALYSIS

EPA agrees that before it signs a notice for the Federal Register announcing the Proposed Next MSGP, it will review examples of numeric and non-numeric effluent limitations (including complete prohibitions, if any) applicable to the discharge of industrial stormwater that have been set in other jurisdictions and evaluate the bases for those limitations.

VI. ADDITIONAL IMPLEMENTATION MEASURES REQUIREMENTS

When EPA signs a notice for the Federal Register announcing the Proposed Next MSGP for public comment, EPA agrees to include in the benchmark monitoring section of the proposed permit “Additional Implementation Measures” (“AIM”) requirements substantially similar to the following:

- A. **Tier 1**: If (A) an annual average for a parameter is over the benchmark threshold; or (B) a single sampling event result for a parameter is over 4x the benchmark threshold, then the operator must immediately review the selection, design, installation, and implementation of its control measures to determine if modifications are necessary to meet the benchmark threshold for that parameter. If any modifications are necessary, the operator must implement those modifications within 14 days, unless doing so within 14 days is infeasible, in which case the operator must document in its Stormwater Pollution Prevention Plan (“SWPPP”) why it is infeasible and implement such modifications within 45 days. The operator does not have to implement any modifications if it determines and documents in its SWPPP that the exceedance is solely attributable to natural background sources or, with EPA agreement, run-on sources, consistent with the requirements in the 2015 MSGP pertaining to natural background and run-on sources.
- B. **Tier 2**: If (A) two consecutive annual averages for a parameter are each over the benchmark threshold; or (B) two sampling event results for a parameter within a two-year period are over 4x the benchmark threshold; or (C) a single sampling event for a parameter is over 8x the benchmark threshold (unless the operator immediately documents in its SWPPP that the single event was an aberration, how any measures taken within 14 days of such event will prevent a reoccurrence, and takes a sample

during the next qualifying rain event that is either less than the benchmark threshold, in which case the operator does not trigger any AIM requirements based on the aberrant event, or less than 4x but greater than 1x the benchmark threshold, in which case the operator triggers Tier 1), then the operator must implement all feasible control measures in the relevant sector-specific fact sheet (except where a given control measure would be counter-productive to the implementation of another control measure, or not result in any reduction in the discharge of the pollutant of concern) within 14 days and document in the SWPPP how the measures will achieve benchmark thresholds and why any sector-specific measures were not implemented. If it is feasible for the operator to implement any measure but not within 14 days, the operator may take up to 45 days to implement such measure, documenting in its SWPPP why it was infeasible to implement such measure in 14 days (EPA may also grant an extension beyond 45 days based on an appropriate demonstration by the operator). The operator does not have to implement any of the feasible control measures if it determines and documents in its SWPPP that the exceedance is solely attributable to natural background sources or, with EPA agreement, run-on sources, consistent with the requirements in the 2015 MSGP pertaining to natural background and run-on sources.

- C. **Tier 3:** If (A) three consecutive annual averages for a parameter are each over the benchmark threshold; or (B) three sampling event results for a parameter within a three-year period are each over 4x the benchmark threshold; or (C) two sampling events for a parameter within a three-year period are each over 8x the benchmark threshold; or (D) four consecutive samples for a parameter are over the benchmark

threshold and their average is more than 2x the benchmark threshold, then the operator must install structural source controls (permanent controls such as permanent cover, berms, and secondary containment), and/or treatment controls (e.g., sand filters, hydrodynamic separators, oil-water separators, retention ponds, and infiltration structures) within 30 days (if not feasible within 30 days, the operator may take up to 90 days by documenting in its SWPPP why it is infeasible to install the measure within 30 days; EPA may also grant an extension beyond 90 days based on an appropriate demonstration by the operator). Such controls must be installed with the assistance of a professional engineer or geologist, and structural source controls and/or treatment controls must be installed for the outfall in question, as well as all outfalls at the site that are substantially similar to the outfall in question, unless the operator individually monitors those substantially similar outfalls and demonstrates that Tier 3 requirements are not triggered at those outfalls. The operator does not have to install structural source controls or treatment controls if it determines and documents in its SWPPP that the exceedance is solely attributable to natural background sources or, with EPA agreement, run-on sources, consistent with the requirements in the 2015 MSGP pertaining to natural background and run-on sources. In addition, the operator does not have to install structural source controls or treatment controls if it adequately demonstrates to EPA within 30 days of the Tier 3 trigger occurrence that its discharge does not result in any exceedance of water quality standards and EPA approves such demonstration within 90 days of receipt (EPA may take up to 180 days upon notice to the operator before the 90th day that EPA needs such extra time). The demonstration to EPA, which will be made publicly

available, must include the following minimum elements in order to be considered for approval by EPA: (1) the water quality standards applicable to the receiving water; (2) the flow rate of the stormwater discharge; (3) the instream flow rates of the receiving water immediately upstream and downstream of the discharge point; (4) the ambient concentration of the parameter(s) of concern in the receiving water immediately upstream and downstream of the discharge point demonstrated by full-storm composite sampling; (5) the concentration of the parameter(s) of concern in the stormwater discharge demonstrated by full-storm, flow-weighted composite sampling; (6) any relevant dilution factors applicable to the discharge; and (7) the hardness of the receiving water. If EPA disapproves such demonstration within 90 days (or 180 days if EPA notifies the operator that it needs more than 90 days), the operator must install structural source controls and/or treatment controls within 30 days of such disapproval (or 90 days if the operator documents in its SWPPP why it is infeasible within 30 days; EPA may also grant an extension beyond 90 days based on an appropriate demonstration by the operator). If a facility continues to exceed the benchmark threshold for the same parameter even after installation of structural source controls or treatment controls, EPA may require the operator to apply for an individual permit. If EPA does not approve or disapprove the demonstration within 90 days (or 180 days if EPA has provided notice that it needs that extra time), then the operator may submit to EPA a Notice of Dispute. Within 30 days, EPA shall submit a response. If that response does not include an approval or disapproval of the demonstration, then both filings shall be submitted to the Director of the Water Management Division for the EPA Region, who shall approve or disapprove the

demonstration within 30 days of receiving the filings. Time for action by the operator upon disapproval shall be tolled during the period from filing of the Notice of Dispute until the decision is issued by the Director of the Water Management Division. That decision shall be final and not appealable.

In the Fact Sheet to accompany the proposed Next MSGP, EPA will include language describing the following: (1) AIM requirements apply on parameter-specific basis; (2) AIM requirements supplement, as opposed to supplant, the technology-based, water quality-based, and remaining provisions of the permit; (3) benchmark thresholds by themselves are not water quality-based effluent limits; (4) regarding annual averages, their calculation (i.e., the clock) is reset upon triggering and complying with each tier individually above; and (5) regarding subparagraph (C) under Tier 2 (“a single sampling event for a parameter is over 8x the benchmark threshold”), an operator may only avail itself of the “aberration” demonstration opportunity one time per parameter per outfall, which shall include substantially similar outfalls.

EPA agrees to explore ways to make exceedances of benchmark thresholds and the control measures the operator will undertake to comply with the AIM requirements publicly available and easily accessible if and when AIM requirements are finalized in the Next MSGP.

VII. CHANGES TO PERMIT ELIGIBILITY CRITERIA AND REGISTRATION PROCESS

EPA agrees that, in the Proposed Next MSGP, it will solicit comment on a provision to the effect that, where a facility not covered under the currently effective MSGP submits a Notice of Intent (“NOI”) for permit coverage while there is a related pending enforcement stormwater-related action by EPA, a state, or a citizen (to include both notices of violations (“NOVs”) by EPA or the State and notices of intent to bring a citizen suit), EPA will hold the facility’s general permit coverage for an additional 30 days to allow EPA an opportunity to (a) review the

facility's SCMs expressed in its SWPPP, (b) identify any additional SCMs that EPA deems necessary to control site discharges in order to ensure that discharges meet technology-based and water quality-based effluent limitations, and/or (c) to conduct further inquiry regarding the site's eligibility for general permit coverage .

VIII. REVISION OF INDUSTRIAL FACT SHEET SERIES FOR ACTIVITIES COVERED BY MSGP

EPA agrees to review and revise by the Proposed Next MSGP's issuance, the MSGP's sector-specific fact sheets to incorporate emerging SCMs that reflect BAT and BCT, as revealed by current industry practice and as may be reflected in the NRC Study, as EPA deems appropriate.

IX. PREVENTING RECONTAMINATION OF FEDERAL CERCLA SITES

In the Proposed Next MSGP, EPA agrees to propose for comment an expansion to all EPA Regions issuing the Next MSGP of the eligibility criterion regarding operators discharging to Federal CERCLA sites.

X. ELIGIBILITY CRITERION REGARDING COAL TAR SEALANTS

In the Proposed Next MSGP, EPA agrees to propose for comment a condition of eligibility that operators who, during their coverage under the next MSGP, will use coal tar sealant to initially seal or to re-seal pavement and thereby discharge polycyclic aromatic hydrocarbons ("PAHs") in stormwater are not eligible for coverage under the MSGP and must either eliminate such discharge or apply for an individual permit.

XI. PART 6.2.4.1

In the Proposed Next MSGP, EPA agrees to propose for comment the following edits to the first three paragraphs of Part 6.2.4.1:

“Beginning in the first full quarter following September 2, 2015 or your date of discharge authorization, whichever date comes later, you must monitor once per year at each outfall (except substantially identical outfalls) discharging stormwater to impaired waters without an EPA-approved or established TMDL, as follows:

Compare the list of industrial pollutants identified in Part 5.2.3.2 and any sector-specific benchmark monitoring pollutants to the list of pollutants for which the waterbody is impaired and for which a standard analytical method exists (see 40 CFR Part 136). You must monitor for pollutants that appear on both lists, including “indicator” or “surrogate” pollutants that clearly overlap those lists. Note: if the pollutant of concern for the impaired waterbody is suspended solids, turbidity or sediment/sedimentation, you must monitor for Total Suspended Solids (TSS). If a pollutant of concern is expressed in the form of an indicator or surrogate pollutant, you must monitor for that indicator or surrogate pollutant. No monitoring is required when a waterbody’s biological communities are impaired but no pollutant, including indicator or surrogate pollutants, is specified as causing the impairment, or when a waterbody’s impairment is related to hydrologic modifications, impaired hydrology, or other non-pollutant. Permittees should consult the appropriate EPA Regional Office for any available guidance regarding required monitoring parameters under this part.

If the monitored pollutant is not detected in your discharge for three consecutive years, or it is detected but you have determined that its presence is caused solely by natural background sources, you may discontinue monitoring for that pollutant. To support a determination that the pollutant’s presence is caused solely by natural background sources, you must document and maintain with your SWPPP, as required by Part 5.5:”

XII. STAY OF MSGP LITIGATION

Promptly after the Effective Date, the Parties agree to file with the Court a joint motion to hold the MSGP Litigation in complete abeyance until such time as this Agreement is terminated. EPA's obligations under this Settlement Agreement will take effect only if the Court grants the requested abeyance or Petitioners voluntarily dismiss the MSGP Litigation.

XIII. TERMINATION AND MOTIONS; DISMISSAL OF LITIGATION

In the event that this Agreement is terminated because Petitioners have chosen to reactivate the Litigation, the Parties will file motions to govern further proceedings. In the event that this Agreement is terminated because EPA has discharged its obligations hereunder, culminating in issuance of the final Next MSGP, the Parties agree to join in a motion to dismiss the Litigation, with prejudice.

XIV. CHALLENGES TO THE NEXT MSGP

Any challenge to EPA's final action in issuing the Next MSGP must be brought in a new action. Petitioners reserve whatever rights they may have to bring such a challenge, and EPA reserves all rights it may have to defend against such a challenge.

XV. DISPUTE RESOLUTION; REMEDY FOR NON-COMPLIANCE

In the event of a disagreement concerning any aspect of this Agreement, including any asserted noncompliance with the Agreement, EPA or Petitioners (whichever is dissatisfied) shall provide the other with written notice of the dispute and a request for negotiations. EPA and Petitioners shall meet and confer in order to attempt to resolve the dispute within 21 days of the written notice, or, for a dispute concerning the failure of the NRC to complete its Study by January 1, 2019, within 14 days of the written notice, or such time thereafter as is mutually agreed upon. Intervenors will be informed of any meeting to confer or other dispute resolution meeting, and will be invited to participate therein. If EPA and Petitioners are unable to resolve

the dispute within 21 days of such meeting, or, for a dispute concerning the failure of the NRC to complete its Study by January 1, 2019, within 14 days of the meeting, then Petitioners' sole remedy for asserted noncompliance is to reactivate the MSGP Litigation, and any such reactivation renders any remaining EPA obligations under this Agreement null and void. EPA does not waive or limit any defense relating to such Litigation. The Parties agree that contempt of court is not an available remedy under this Agreement. In order to invoke the procedures and remedies in this Paragraph, any written notice of a dispute and request for negotiations provided by Petitioners must be signed by authorized representatives of each Petitioner.

XVI. FORCE MAJEURE

The possibility exists that circumstances outside the reasonable control of EPA could delay EPA's compliance with the timelines, responsibilities or other expectations contained in this Agreement. Such situations include, but are not limited to, a government shutdown; or an extreme weather event that prevents EPA staff (or, in the case of matters addressed in Paragraph III, the NRC or the Academies) from meeting the timelines, fulfilling the responsibilities, or meeting the expectations contained in this Agreement; or a catastrophic environmental or other event that diverts EPA's staff resources away from meeting the timelines, fulfilling the responsibilities, or meeting the expectations contained in this Agreement. Should a delay occur due to such circumstances, any resulting failure by EPA under this Agreement shall not constitute a failure to comply with the terms of this Agreement, and any timelines so affected shall be extended one day for each day of the delay. EPA will provide Petitioners with reasonable notice and explanation for the delay (including an explanation of how EPA staff assigned to the MSGP were affected by the event causing the delay) in the event that EPA invokes this provision. Any dispute regarding invocation of this provision, or the length of the

claimed delay, shall be resolved in accordance with the dispute resolution provision of Paragraph XV of this Agreement.

XVII. AGENCY DISCRETION; COMPLIANCE WITH OTHER LAWS

Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Water Act or by general principles of administrative law; nor shall it in any way be deemed to limit EPA's discretion in issuing any final MSGP.

Further, EPA's obligations under this Settlement Agreement are subject to the availability of appropriated funds applicable for such purpose. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take any action in contravention of the APA, the CWA, or any other law or regulation, either substantive or procedural.

XVIII. MODIFICATIONS IN WRITING

Any term set forth in this Settlement Agreement may be modified, but only by written agreement of Petitioners and EPA.

XIX. NOTICES

Any notices required or provided for by this Settlement Agreement must be made in writing, via electronic mail and by U.S. Mail, and sent to the following:

For Petitioners:

Edan Rotenberg
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XX. ENTIRE AGREEMENT

This is the entire Settlement Agreement among the parties with respect to the MSGP and the MSGP Litigation. All prior conversations, meetings, discussions, drafts, and writings of any kind are superseded by this Settlement Agreement and may not be used by the Parties to vary or contest the terms of this Settlement Agreement, or as evidence of the Parties' intent in entering into this Settlement Agreement. Further, the Parties agree that all prior conversations, meetings, discussions, drafts, and writings of any kind relating to or exchanged in connection with this Settlement Agreement are to be treated as confidential, settlement-related communications that will not be disclosed without court order.

XXI. MUTUAL DRAFTING

This Settlement Agreement was drafted jointly by the Parties with the assistance of counsel. The Parties agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party will be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

XXII. NO THIRD PARTY BENEFICIARIES

Nothing in this Settlement Agreement shall bind, obligate, or otherwise create any rights or duties applicable to or enforceable by, or impose any conditions or limitations upon, any person or entity that has not signed the Settlement Agreement; nor shall the Settlement Agreement be construed to make any such persons or entity a third-party beneficiary of the Settlement Agreement.

XXIII. USE OF SETTLEMENT AGREEMENT

This Agreement does not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any Party.

XXIV. APPLICABLE LAW

This Agreement shall be governed by and construed under the laws of the United States.

XXV. ATTORNEYS' FEES

The United States shall pay attorneys' fees to counsel for Petitioners, within 90 days after the Effective Date of this Agreement, in the amount of \$165,000 (one hundred and sixty-five thousand dollars), by electronic funds transfer in accordance with instructions provided in writing to EPA's counsel by Petitioners' counsel. Such obligation is subject to the availability of appropriations in accordance with the Anti-Deficiency Act, 31 U.S.C. § 1341. Nothing in this Agreement may be construed to waive any right any Petitioner may have to seek attorneys' fees for any costs of litigation associated with reactivation of litigation pursuant to Paragraph XIII and XV of this Agreement and nothing in this Agreement shall be construed to limit the United States' right to oppose any such claims.

If the United States fails to make the payment specified above within 90 days following the Effective Date of this Agreement, Petitioners may make application to the Court for an award of costs and attorneys' fees incurred in this suit (and for reasonable costs and fees incurred in seeking such award), which shall be Petitioners' sole remedy for failure of the United States to make timely payment under this Agreement. The Parties agree that in litigation over such fee application, they will not disclose to the Court the above agreed-upon amount.

Petitioners agree that payment of the above agreed-upon amount to Petitioners' counsel within 90 days following the Effective Date of this Agreement, or acceptance by Petitioners' counsel of such payment on any subsequent date, shall constitute full and final payment of all attorneys' fees and costs incurred by Petitioners in connection with the consolidated cases comprising the MSGP Litigation. Such payment or acceptance of payment shall release the

United States, including EPA, from any and all claims by Petitioners regarding such fees and costs.

XXVI. TERMINATION

This Agreement shall terminate on the earlier of (a) the date that EPA fulfills the last of its obligations under this Agreement, or (b) the date that Petitioners notify EPA that Petitioners have elected to terminate this Agreement and reactivate the MSGP Litigation.

XXVII. COUNTERPARTS

This Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original Agreement, and all of which shall constitute one Agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

XXVIII. AUTHORITY

Each undersigned representative of the Parties certifies that he or she is fully authorized by the Party to enter into this Settlement Agreement and to bind such Party to comply with the terms and conditions herein.

FOR RESPONDENT EPA

Martin F. McDermott

Dated: August 16, 2016

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Counsel for Respondent EPA

FOR PETITIONERS



Dated: 8/16/2016

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Dated: 16 Aug 2016

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Dated: August 16, 2016

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