MEMORANDUM OF UNDERSTANDING
BETWEEN THE DEPARTMENT OF TRANSPORTATION AND
THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
REGARDING THE SPDES GENERAL PERMIT FOR STORMWATER
DISCHARGES FROM CONSTRUCTION ACTIVITY, GP-02-01

Principles and Practices
It is the mission of the New York State Department of Transportation (NYSDOT) to ensure our customers -- those who live, work and travel in New York State -- have a safe, efficient, balanced and environmentally sound transportation system.

New York State supports a state and local highway system that annually handles over 100 billion vehicle miles. NYSDOT’s project letting program is approximately $1.2 billion annually.

As part of its mission and as New York State's largest public works agency, NYSDOT has an obligation and a responsibility to the people of New York to enhance, improve and protect the environment in accordance with state policies and objectives. To meet that responsibility, NYSDOT has adopted an environmental ethic that has been instituted throughout the Department.

NYSDOT recognizes that, with its extensive network of state highways, it is in a position to assist in improving New York's water quality. NYSDOT routinely incorporates erosion and sediment control and water quality enhancements into its activities and retrofits existing highway drainage systems as appropriate.

On January 8, 2003, the New York State Department of Environmental Conservation (NYSDEC) issued a State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity, GP-02-01.

NYSDOT supports the principles of the SPDES General Permit for Stormwater Discharges from Construction Activity, GP-02-01, in its intent to protect and improve the state’s water quality. There are provisions in the SPDES GP-02-01, however, that would limit NYSDOT in its obligation to maintain and operate the State's highways and bridges in a safe, timely, cost effective and environmentally sound manner.

This Memorandum of Understanding (MOU) sets forth mutually agreeable principles, practices, and understandings reached between NYSDOT and the NYSDEC regarding implementation of the SPDES Stormwater General Permit as it pertains to NYSDOT construction and maintenance activities.

In no case does this MOU authorize NYSDOT to cause or contribute to water quality violations.
Implications and Understandings
To avoid halting NYSDOT’s capital program, NYSDOT proposes the following understandings to resolve the permit compliance issues:

1. **Stormwater Quality and Quantity Controls for Construction Projects under Five Acres**
   Revisions to the Draft General Permit for Stormwater Discharges from Construction Activity issued in September 2002 that were incorporated into the Final General Permit for Stormwater Discharges from Construction Activity issued in January 2003 resulted in NYSDOT being required to develop a Stormwater Pollution Prevention Plan (SWPPP) for projects between 1 acre and 5 acres that would include water quantity and water quality control components, which was not a requirement included in the draft permit.

   Therefore, projects involving soil disturbances between 1 acre and 5 acres will have not been designed to address water quantity and water quality components. The SWPPPs for these projects may not be considered acceptable.

   **Proposed Understanding**
   For projects scheduled for contract letting before January 15, 2004, NYSDOT will provide erosion and sediment control protection as per NYSDOT’s Soil Erosion and Sediment Control Standard Specifications on projects with disturbances in the range of one to five acres. These projects will not require stormwater quantity and quality control. NYSDOT shall revise its operating procedures to be in compliance with the requirements of GP-02-01 for contract lettings on January 15, 2004. Accordingly, projects let prior to January 15, 2004 may not include some SWPPP requirements.

2. **Additional Efforts to Provide Stormwater Management**
   There will be NYSDOT projects that will not be regulated under GP-02-01, but offer opportunities for NYSDOT to provide water quality enhancements, especially in environmentally stressed watersheds, or projects proximate to other NYSDOT projects where the Technical Standards may not have been met.

   **Proposed Understanding**
   NYSDOT will coordinate with NYSDEC to identify potential water quality enhancements in conjunction with transportation activities not regulated under GP-02-01. Although NYSDOT has already begun this effort to identify and construct Environmental Benefit Projects in accordance with the Governor’s Environmental Initiative, this Understanding is included in this Memorandum of Understanding to reinforce NYSDOT’s commitment to using its resources to protect and enhance water quality in New York State.

3. **“Technical Standards”**
   NYSDOT may have difficulty applying the NYSDEC’s Technical Standards on some projects because of topography, available right-of-way, existing natural, cultural, and social resources, and
competing interests of the public, which are limiting factors for NYSDOT. For these reasons, there will be projects for which strict adherence to this criteria may be clearly unreasonable. For such projects, Notices of Intent (NOIs) submitted to NYSDEC will require a sixty business day review as per Part 1.D.3.b of the general permit before gaining coverage under this general permit and before initiating any construction activities.

Proposed Understanding

Development of SWPPPs will be an integral part of project design. Except where clearly unreasonable, NYSDOT will develop SWPPPs for all applicable projects with letting dates on or after January 15, 2004, in accordance with the New York State Stormwater Management Design Manual. For projects where application of NYSDEC technical standards is clearly unreasonable, NYSDOT will propose SWPPPs with “acceptable deviations” from the Technical Standards. NYSDOT regional offices will coordinate with their respective NYSDEC regional Division of Water offices to determine what deviations are acceptable on a project-by-project basis. Section VII of the Notice of Intent will be used to provide justification when NYSDOT will not meet the technical standards.

Where NYSDOT proposes SWPPPs within TMDL watersheds or discharging to 303(d) listed segments, the SWPPPS are to be prepared in conformance with NYS Technical Standards. Where strict conformance with the standards is a physically impossible hardship, conformance with the permit may be established through a credit system. Under such a credit system, NYSDOT will descriptively and quantitatively justify such a hardship in the plan and provide for a commensurate or greater reduction in pollutant transport elsewhere in the respective watershed or to the 303(d) listed segment. Credits must be earned, for the justified portion of the plan, through integrating water quality controls on other construction or maintenance activities, and/or implementing water quality improvement projects within the highway corridors of the same watershed or to the same 303(d) listed segment.

By the end of the 2004 construction season, NYSDEC and NYSDOT will develop a summary of construction project situations where strict application of NYSDEC technical standards are clearly unreasonable, and “acceptable deviations” for those projects. This summary will be developed after the effective date of this Memorandum of Understanding, and will not negate the need for NYSDEC and NYSDOT to coordinate on specific projects.

4. Routine Maintenance Activities

NYSDOT maintenance forces routinely perform many activities that involve soil disturbances, though some of these activities may not be characterized as “construction activities”.

Proposed Understanding

As it pertains to NYSDOT projects, any routine maintenance that disturbs less than five acres and that is performed to maintain the approximate original line and grade, hydraulic capacity or original purpose of a facility shall not be regulated under GP-02-01.
NYSDOT routine maintenance activities that would not be considered “construction” will be regulated under the “Pollution Prevention/Good Housekeeping” control measure in the NYSDEC General Permit for Stormwater Discharges from MS4s, GP-02-02.

Examples of such routine maintenance include:

a. Cleaning and shaping of existing ditches that maintain the approximate original line and grade, and hydraulic capacity of the ditch;

b. Cleaning and shaping of existing ditches that does not maintain the approximate original line and grade, hydraulic capacity and purpose of the ditch if the changes to line and grade, hydraulic capacity or purpose of the ditch are installed to improve water quality and quantity controls;

c. Placing of stone shoulder backing that makes the transition between the shoulder and the ditch or embankment;

d. Milling and repavement or other similar work that does not result in soil disturbance such as disturbance of the gravel subbase;

e. Long-term use of equipment storage areas at or near NYSDOT maintenance facilities; or

f. Removal of sediment at the edge of the highway to restore a previously existing sheet-flow drainage connection from the highway surface to the highway ditch or embankment.

By the end of the 2004 construction season, NYSDEC and NYSDOT will develop a list of additional maintenance project situations that qualify as routine maintenance for the purposes of this Memorandum of Understanding.

5. “Soil Disturbance”
NYSDEC’s SPDES General Permit GP-02-01 refers to construction activities involving greater than “one acre of soil disturbance.”

Proposed Understanding
“Soil disturbance” is defined as “any activity that disturbs or exposes soil”. As it pertains to NYSDOT projects, any routine maintenance defined in accordance with Understanding #4 that disturbs less than five acres will not be used in calculations of acres disturbed.

6. Off-site Activities
NYSDOT contractors routinely use sites outside of the project limits to conduct operations relative to the highway project.
**Proposed Understanding**

_Surplus material (spoil) disposal areas, borrow areas, equipment staging areas, and temporary concrete batch plant operations established for the duration of a construction project and having no proposed permanent features shall be considered temporary construction activities and will require only temporary controls during construction, provided they are stabilized at the end of construction and that they do not exacerbate fluctuations in water quantity leaving the site. The landowners of these sites will be the “Operators” as defined by the general permit, and will be required to obtain permit coverage. NYSDOT will notify contractors of the need for permit coverage in such areas. NYSDOT will not include sites outside of the state right-of-way (except for easements, occupancies, and releases) in its SWPPP, but may include sites outside of the contract limits if the site is within the state right-of-way._

7. **Concurrent review of Notices of Intent and Permit Applications**

NYSDEC’s SPDES General Permit for Construction Activities states “New stormwater discharges from construction activities that require any other Uniform Procedures Act permit cannot be covered under this general permit until all other permits are obtained. Upon satisfaction of the State Environmental Quality Review Act (“SEQRA”) for the proposed action and issuance of necessary permits, the applicant may submit an NOI to obtain coverage under this general permit.” It is possible to interpret this to mean that NOI’s shall not be submitted until other permits have been obtained. The requirement of obtaining all permits prior to submitting the SPDES NOI would delay a significant percentage of NYSDOT’s capital projects.

**Proposed Understanding**

_For projects with new stormwater discharges from construction activities, NYSDOT may submit NOI’s to the NYSDEC central office at the time when other environmental permit applications to NYSDEC regional offices for concurrent review. A SEQRA Determination or Findings will be required prior to the submittal of a NOI._

8. **Definition of “Operator”**

NYSDEC’s SPDES General Permit for Construction Activities defines an “Operator” as “the person, persons, or legal entity which owns or leases the property on which the construction activity is occurring.” NYSDOT does not always own or lease the property on which the construction activity is occurring, thus would not be considered the “Operator” under this definition in those situations.

**Proposed Understanding**

_As it pertains to NYSDOT projects, the term “Operator” means the agency or party which controls the activities on the property upon which the construction activity is occurring. NYSDOT shall assume the role and responsibility of the “Operator” on NYSDOT projects,
within contract limits (including easements, occupancies, and releases) on which NYSDOT is not the owner of the property.

9. “Licensed/Certified Professional”
NYSDEC’s SPDES General Permit GP-02-01 defines “licensed/certified professional” as “a person currently licensed to practice engineering in New York State or is a Certified Professional in Erosion and Sediment Control (CPESC).” This definition does not include licensed Landscape Architects that are responsible for much of the erosion and sediment control and stormwater management program implementation within NYSDOT.

**Proposed Understanding**
As it pertains to NYSDOT projects, a “licensed/certified professional” means “a person currently licensed to practice Engineering or Landscape Architecture in New York State, a Certified Professional in Erosion and Sediment Control (CPESC), or a Certified Professional in Stormwater Quality (CPSWQ). Any activities performed by a licensed/certified professional must, in any case, comply with New York State Education Law.

10. “Qualified Professional”
NYSDEC’s SPDES General Permit GP-02-01 defines “Qualified Professional” as “a person knowledgeable in the principles and practices of erosion and sediment controls, such as a licensed professional engineer, Certified Professional in Erosion and Sediment Control (CPESC), or a soil scientist.” This definition does not include Landscape Architects or Environmental Specialists that have the primary responsibility for implementation and oversight of the NYSDOT erosion and sediment control and stormwater management program.

**Proposed Understanding**
As it pertains to NYSDOT projects, a “Qualified Professional” means “a person knowledgeable in the principles and practices of erosion and sediment controls, including but not limited to, Engineer-in-Charge, licensed Professional Engineer, licensed Landscape Architect, Certified Professional in Erosion and Sediment Control (CPESC), or a certified Soil Scientist. It may also mean an Environmental Specialists or others knowledgeable in the principles and practices of erosion and sediment control, provided that these persons are under the supervision of a licensed Professional Engineer or licensed Landscape Architect”.

11. Construction Sequencing
On Page 11 - III.D.2.a of GP-02-01- Under “For all construction activities subject to this general permit”, item (4) states: “provide a construction phasing plan describing the intended sequence of construction activity...that results in soil disturbance. Consistent with the New York Guidelines for Urban Erosion and Sediment Control, there shall not be more than five (5) acres of disturbed soil at any one time without prior written approval from the Department;” It will be impossible in some cases to construct some portions of highway projects without disturbing more than five acres.
Moreover, the permit does not describe the nature of the stabilization required to consider a disturbed site no longer “disturbed”.

**Proposed Understanding**
The area of disturbance shall be limited to the minimum amount practicable, and shall be commensurate with the operator’s capability to install temporary and permanent erosion control measures in accordance with the approved sequencing plan and Section 209, “Soil Erosion and Sediment Control”, of NYSDOT’s Standard Specifications. The sequencing plan shall address the operational requirements of the site and the available resources to maintain adequate erosion and sediment control. Any objection NYSDEC has to such a sequencing plan shall be provided to NYSDOT within twenty-one calendar days of receipt. If no such objection is made by NYSDEC in writing within twenty-one calendar days, NYSDOT shall consider the sequencing plan to be approved.

When the total soil disturbance exceeds five acres, NYSDOT shall monitor these areas every business day, and have the ability to require immediate stabilization measures as needed to prevent excessive exposure in critical areas (adjacent to surface waters, steeply sloped areas and adjacent to tributary drainage). This monitoring shall be done by a construction inspector, and reported in a Daily Inspection Report.

**12. Termination of Projects Covered Under GP-93-06**
Some NYSDOT projects previously covered under GP-93-06 may extend beyond August 1, 2003, thereby requiring coverage under GP-02-01.

**Proposed Understanding**
For any construction project which was previously covered under GP-93-06 and requires coverage under GP-02-01, the continued implementation of the SWPPP that was developed and implemented in accordance with GP-93-06 is acceptable until such time as a Notice of Termination (NOT) for GP-02-01 is submitted.

**13. Signatories**
GP-02-01 requires appropriate signatories for Notices of Intent, Notices of Termination (NOT) and all reports and inspections submitted or performed in accordance with the general permit.

**Proposed Understanding**
NOIs, NOTs, and SWPPPs for a NYSDOT activity shall be signed by the Regional Director, Regional Design Engineer, Regional Construction Engineer, or Regional Transportation Maintenance Engineer for the NYSDOT region possessing primary responsibility for oversight of the activity. All reports, certifications, or information required by this permit or submitted pursuant to this permit to be signed by NYSDOT shall be signed by the Regional Director, Regional Design Engineer, Regional Construction Engineer, Regional Transportation Maintenance Engineer, Licensed/Certified Professional or a Qualified...
Professional for the NYSDOT region possessing primary responsibility for oversight of the activity.

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